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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-

CBS INC.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (KELLEHER, D.J.), UNITED STATES OF AMERICA and NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner CBS Inc. ("CBS") respectfully prays that a writ of certiorari issue to review an order of the United States Court of Appeals for the Ninth Circuit denying CBS's petition for a writ of mandamus, entered on April 12, 1978.

OPINIONS BELOW

The decision sought to be reviewed in the Court of Appeals is the Final Judgment in *United States* v. *National Broadcasting Company, Inc.*, Civ. No. 74-3601-RJK (C. D. Cal.), an antitrust consent decree entered on November 28, 1977, pursuant to the Antitrust Procedures and Penalties

Act, 15 U.S.C. § 16(b)-(h) ("APPA"), by the United States District Court for the Central District of California (Kelleher, D.J.). That Final Judgment is reported at 1978-1 Trade Cas. ¶ 61,855, and is set forth in the separately bound Appendix to this petition at App. 20a.* The District Court's Memorandum of Decision Re Consent Decree, setting forth the grounds on which it had determined, as required under the APPA, that entry of the Final Judgment was "in the public interest", was entered on January 27, 1978. The Memorandum of Decision is reported at 449 F. Supp. 1127 and 1978-1 Trade Cas. ¶ 61,842, and is set forth in the Appendix hereto at 41a.

The Order of a two-judge panel of the United States Court of Appeals for the Ninth Circuit denying CBS's petition for mandamus was entered, without opinion, on April 12, 1978, and has not been reported. It is set forth in the Appendix at 7a.

On February 5, 1979, CBS's timely Petition for Rehearing and Rehearing In Banc was denied by unreported order of a two-judge panel of the Court of Appeals which is set forth in the Appendix at 8a.

JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit denying CBS's petition for mandamus was entered on April 12, 1978. A timely petition for rehearing and rehearing in banc was denied on February 5, 1979, and this petition for certiorari was timely filed in accordance with 28 U.S.C. § 2101(c) and U.S. Sup. Ct. R. 22 and 34. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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* References to "App. " are to the separate Appendix to this petition submitted herewith.

QUESTIONS PRESENTED

The District Court, purportedly acting pursuant to the APPA, held that a consent decree in a government antitrust suit is "in the public interest", notwithstanding a showing by unrebutted expert affidavits and other submissions that the effect of the decree is (1) to restrain trade and suppress competition, (2) to establish a regulatory regime which overlaps and conflicts with the regulatory authority of the Federal Communications Commission, and (3) to impose prior restraints on a form of expression protected by the First Amendment. The Court justified its holding on the ground that the decree was consistent with the objectives of the Department of Justice in filing the complaint. The Court entered the decree in the face of unanimous industry opposition, without obtaining the views of any other government agency, without oral argument, and after denying petitioner's timely motions for intervention (under Fed. R. Civ. P. 24) and for an evidentiary hearing (under 15 U.S.C. § 16(f)).

Under such circumstances,

1. Did the District Court abdicate its responsibility under the APPA to make an independent judicial determination that the decree is "in the public interest", and not merely to rubber-stamp the position of the Department of Justice?

2. Did the Court of Appeals err in denying a petition for mandamus seeking review of the District Court's action, without requiring any response to the petition, and without giving any reason for such denial?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision and statutes involved in this case are the Constitution of the United States, Amendment I, the Sherman Act, 15 U.S.C. §§ 1, 2, and the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h). The text of each is set forth in the Appendix at 1a-6a.

STATEMENT OF THE CASE

1. The Complaint.

The complaint in *United States* v. *NBC* (App. 9a) was filed in the United States District Court for the Central District of California on December 10, 1974. The complaint alleges that NBC has monopolized and unreasonably restrained "the trade and commerce in television entertainment programs exhibited on the NBC Television Network during prime evening hours" in violation of Sections 1 and 2 of the Sherman Act. Virtually identical complaints making the same charges as to CBS and ABC were filed at the same time.* None of the complaints charges that NBC, CBS or ABC have agreed, conspired or colluded with each other in any way. The NBC complaint prays for injunctive relief, *inter alia,* restraining NBC from broadcasting entertainment programs produced by NBC and from bargaining for various rights with respect to programs obtained by NBC under licenses from independent producers.

2. The Proposed Decree and Accompanying Competitive Impact Statement.

On November 17, 1976, plaintiff and NBC filed a stipulation providing for the entry of a consent decree in the *NBC* action upon compliance with the provisions of the APPA. That proposed decree, with minor modifications, was entered by the District Court on November 28, 1977.* (App. 20a)

Consistent with the prayer of the complaint, the *NBC* decree restricts NBC from carrying on its network more than a limited amount of television entertainment programming produced by NBC (Section V(A)), prohibits NBC

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* *United States* v. *National Broadcasting Company, Inc.*, Civ. No. 74-3601-RJK (*"NBC"*); *United States* v. *CBS Inc.*, Civ. No. 74-3599-RJK (*"CBS"*); *United States* v. *American Broadcasting Companies, Inc.*, Civ. No. 74-3600-RJK (*"ABC"*). Predecessor complaints against each network, virtually identical to the present complaints, were filed in April 1972. Those complaints were dismissed without prejudice on November 13, 1974 (65 F.R.D. 415), because of the government's refusal to comply with discovery orders relating to defendants' defense that the actions had been commenced for the purpose of restraining and intimidating network news coverage and criticism of President Nixon and his administration. Such a prosecutorial purpose is impermissible under the First and Fifth Amendments and rendered the lawsuits constitutionally defective. *See, e.g., Blackledge* v. *Perry,* 417 U.S. 21 (1974); *Oyler* v. *Boles,* 368 U.S. 448 (1962); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886); *United States* v. *DeMarco,* 550 F.2d 1224 (9th Cir.), *cert. denied,* 434 U.S. 827 (1977); *United States* v. *Steele,* 461 F.2d 1148 (9th Cir. 1972). The allegations of that defense were supported by a substantial body of evidence that came to light during the Watergate and related investigations.

Defendants appealed the District Court's order insofar as it provided for dismissal *without* prejudice, but said appeal was dismissed by this Court for want of jurisdiction. *National Broadcasting Co.* v. *United States,* 421 U.S. 940 (1975). The present, virtually identical, complaints were filed within weeks after dismissal of the earlier actions.

* Certain of the provisions of the *NBC* decree do not come into effect unless "similar" relief is obtained by plaintiff against both CBS and ABC. Should the *CBS* or *ABC* action be dismissed or should "different" relief be had in either case, NBC is permitted to seek a modification of its decree so as not to be placed at a "competitive disadvantage" to CBS or ABC. (Competitive Impact Statement at 13, 14, 41 Fed. Reg. 52015, 52027-28 (1976))

from obtaining certain rights and interests in television entertainment programming it acquires from outside program suppliers (Sections IV(A); IV(B); VI) and regulates the conduct of negotiations and the terms of trade between NBC and its outside program suppliers (Section VI).

Plaintiff's Competitive Impact Statement, published with the proposed decree as required by 15 U.S.C. § 16(b), conclusorily asserted that the effect of the proposed decree will be to permit the "forces of competition ... to operate more freely on NBC's program procurement practices" (41 Fed. Reg. at 52021) and that the limitation on NBC's internal production would

> "enhance competition in television entertainment production and exhibition by eliminating the possibility that NBC could substantially increase its internal production of its network programs and thereby exclude independent program suppliers." (*Id.* at 52022)

Plaintiff also asserted in substance that, by enjoining NBC from acquiring various rights from its suppliers at any price, the decree would give those in "other fields" an opportunity to buy these rights without having to compete with NBC. (*Id.* at 52023)

Plaintiff did not offer any expert economic opinion or other evidentiary materials in support of its Competitive Impact Statement. Further, plaintiff represented that there were no materials or documents it considered determinative in formulating the proposed consent decree so that there was nothing it was required to disclose pursuant to 15 U.S.C. § 16(b).

3. Opposition to the Decree.

Following the filing of the proposed decree and Competitive Impact Statement in November 1976, an unprecedented barrage of critical comments was submitted to the Department of Justice, and subsequently transmitted to the court pursuant to the APPA (15 U.S.C. § 16(d)). Virtually all of those comments, submitted by some 70 corporations, associations and individuals, including representatives of virtually every aspect of the television industry and of many public interest groups, denounced the proposed judgment as "anticompetitive" or plaintiff's Competitive Impact Statement as "inaccurate" and "inadequate".*

CBS submitted comments in opposition to the proposed decree and moved to intervene in the action. CBS supported its comments and motion to intervene with affidavits of three professors of economics and a professor of law** showing that the proposed *NBC* decree would itself tend to suppress competition in the marketplace and would not be in the "public interest" as required by the APPA.

The economists concluded that the probable economic effect of restraining NBC's ability to broadcast programming produced by it and of otherwise restricting NBC's

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* The comments and the responses of the Department of Justice thereto were published, pursuant to the APPA, at 42 Fed. Reg. 24995-25312 (1977).

** Franklin M. Fisher, Professor of Economics at the Massachusetts Institute of Technology, William J. Baumol, Professor of Economics at Princeton University and New York University, Paul L. Joskow, Associate Professor of Economics at the Massachusetts Institute of Technology and Richard A. Posner, Professor of Law at the University of Chicago Law School. These affidavits are set forth in the Appendix at 82a, 109a, 112a and 98a, respectively.

ability to bargain for certain terms and conditions would be (i) to "restrict", "reduce" and "inhibit" competition among producers of television entertainment programming; (ii) to cause increased concentration among such producers; and (iii) to increase prices of the programs supplied to the networks. Professor Posner concluded that the consent decree was "anticompetitive", "inconsistent with the public interest as expressed by the Sherman Act" and, hence, "manifestly contrary to the statutory standard" of the APPA.

4. The District Court's Entry of the Decree Without Permitting Intervention or an Evidentiary Hearing.

On June 20, 1977, the District Court denied CBS's motion to intervene.* However, in its Memorandum of Decision and Order, the court said that the question of whether the proposed *NBC* decree would have an anticompetitive effect on the television industry involved "a major inquiry" which the court would pursue in its further consideration of the decree.

Seeking the "inquiry" promised by the District Court, CBS on November 7, 1977, filed a motion under 15 U.S.C. § 16(f) for an order setting an evidentiary hearing on the proposed decree and authorizing CBS as an "interested person" under 15 U.S.C. § 16(f) (3) to participate.**

Prior to the return date of CBS's motion for a hearing, the District Court signed and filed the proposed Final Judgment on November 23, 1977. Although the Judgment recites that its entry is "in the public interest" (App. 37a), the

* CBS's appeal from the denial of its motion to intervene was argued before a panel of the United States Court of Appeals for the Ninth Circuit on April 3, 1979, and is *sub judice*. See p. 24 *infra*.

** Motions seeking such a hearing were also made by ABC, certain motion picture companies and others.

District Court did not then offer any explanation of the basis for its "public interest" determination.

5. CBS's Petition for Mandamus.

On December 20, 1977, CBS filed a petition for a writ of mandamus pursuant to 28 U.S.C. § 1651 and Fed. R. App. P. 21 in the United States Court of Appeals for the Ninth Circuit. CBS's petition alleged that the District Court's determination that the decree is "in the public interest" constituted a clear error in the interpretation of a major new legislative enactment since it would operate to drive up prices paid to producers of television programming by restraining competition among them and therefore conflicts with the public policy declared by the Sherman Act. CBS pointed out that, as a major purchaser of television entertainment programming, it was directly affected by the decree's restraint on competition among program suppliers, that neither of the parties in *United States* v. *NBC* was in a position to appeal the court's decision, and that CBS had no means of obtaining appellate review other than mandamus.

CBS's petition further argued that the District Court's entry of the decree, notwithstanding the unrebutted showing of its anticompetitive nature, without invoking any of the procedural safeguards contemplated by 15 U.S.C. § 16(f), was a clear abuse of discretion in the circumstances of this case. Indeed, the District Court had failed even to set forth the basis for its "public interest" determination.

Finally, CBS urged that the *NBC* decree improperly subjects the industry to a major restrictive, regulatory scheme that conflicts with and overlaps the regulatory activities of the FCC, and imposes a prior restraint on speech impermissible under the First Amendment.

6. The District Court's Belated Explanation of Its "Public Interest" Finding.

On April 12, 1978, a two-judge panel of the Ninth Circuit denied CBS's mandamus petition and over two months after entry of the *NBC* decree, the District Court filed a "Memorandum of Decision Re Consent Decree" setting forth for the first time the basis for its determination that entry of the *NBC* decree was "in the public interest". (App. 41a)

The District Court appeared to accept CBS's analysis of the purpose and competitive effect of the *NBC* decree. The District Court found that the decree was designed to "even out the bargaining positions of NBC and its independent program suppliers", to enable NBC's program suppliers to "obtain more favorable terms than was heretofore possible" and, hence, to "improve the lot" of suppliers. (App. 60a-61a, 80a) And the court acknowledged that the decree does not achieve its purposes by enhancing or fostering competition among program buyers. (App. 80a) Instead, it does so by restraining NBC's actual and potential competition with program suppliers. The court nevertheless found that the *NBC* decree "advances and is consistent with" the apparent purpose of the Antitrust Division in filing the complaint and, hence, is in the public interest. (App. 61a, 77a, 80a)*

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* The District Court disposed of what it recognized as the "serious problem" of reconciling the *NBC* decree with the FCC regulatory role by concluding that "the burden would fall on the [Federal Communications] Commission to formulate regulations not in conflict with outstanding judicial orders". (App. 65a-66a)

The District Court brushed aside objections that the *NBC* decree conflicts with important First Amendment values, and hence was not in the public interest, by declaring CBS without "standing" to assert NBC's constitutional rights and by characterizing NBC's program production as a "commercial venture". (App. 67a)

7. The Court of Appeals' Denial of the Petition for Mandamus.

On February 21, 1978, CBS supplemented its petition for mandamus in light of the District Court's Memorandum, pointing out, *inter alia,* that improving the lot of competitors by restraining competition is inconsistent with the public interest as declared by the Sherman Act. *See, e.g., Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977); *Calnetics Corp.* v. *Volkswagen of America, Inc.,* 532 F.2d 674 (9th Cir.), *cert. denied,* 429 U.S. 940 (1976).

On April 12, 1978, a two-judge panel of the Ninth Circuit summarily denied CBS's petition without giving reasons or directing responsive papers from the parties. (App. 7a) CBS's timely petition for rehearing and rehearing in banc was similarly denied on February 5, 1979. (App. 8a)

REASONS FOR GRANTING THE WRIT

This case presents novel and important questions which should be settled by this Court, concerning the proper interpretation and application of the Antitrust Procedures and Penalties Act, and the method of review of district court determinations thereunder. The APPA is a new piece of remedial legislation designed to promote the procompetitive objectives of the antitrust laws and to end "judicial rubberstamping" of consent decrees in government antitrust actions.

The APPA reflects congressional recognition of the far-reaching economic impact of consent decrees in major government antitrust actions and congressional concern that the public interest—and most notably the public interest in a competitive economy—not be neglected in the disposition of such actions through essentially private negotiations

between the litigants. Accordingly, the APPA provides for publication of a proposed consent decree together with a detailed explanation by the Antitrust Division of its character and rationale in a Competitive Impact Statement (15 U.S.C. § 16(b)), grants interested persons an opportunity to comment on the proposed decree, and imposes upon the district courts the duty to make an independent, judicial determination that the proposed decree is in the public interest.*

In imposing this duty on the courts, Congress sought to strike a sound balance between requiring judicial proceedings so extensive as to discourage settlement altogether and leaving the process in the control of the settling parties subject only to the pro forma, rubber-stamp approval of the courts. In striking that balance, Congress provided a wide variety of techniques by which the courts, in the most efficient manner permitted by the circumstances, may adduce the information necessary to an independent, judicial determination, leaving the choice of means to the sound discretion of the court.**

The proper implementation of that balance has presented the district courts with difficult problems (*see, e.g., United States* v. *Gillette Co.*, 406 F. Supp. 713 (D. Mass. 1975)) as to which they have, because of the settlement posture of the cases involved, received virtually no guidance from the appellate courts and precious little from the parties. Yet it is apparent that, unless the APPA is to be deemed a congressional dead letter, the manner of its implementation cannot be left entirely to the wholly unreviewable discretion of the various district courts. In view of the difficulty in achieving the required balance (especially as

* *See generally* S. Rep. No. 298, 93d Cong., 1st Sess. (1973); H.R. Rep. No. 1463, 93d Cong., 2d Sess. (1974).

** *See* 15 U.S.C. § 16(f), set out in the Appendix at 5a-6a; H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8-9 (1974).

regards highly complex, regulatory decrees), there must surely be limits beyond which a district court abuses its discretion and some appellate remedy must be found. Were, for example, a district court to approve a consent decree while expressly conceding that it was *not* in the public interest, the point would be obvious. Yet that, in substance, is what happened here. The decree was shown by unchallenged affidavits to be—and is on its face—an arrangement calculated to drive up the price of television programs by curtailing production. Had it been an agreement between purely private parties it would be clearly seen as a classic cartel arrangement. Yet the District Court approved the decree because it found it to be consistent with the purpose of the Antitrust Division in filing the complaint. Moreover, the court reached this conclusion—insufficient as a matter of law—without availing itself of *any* of the devices provided by Congress for obtaining the requisite information except those which were not in its power to avoid.

In sum, this case presents an appropriate vehicle for a delineation of the scope of the district courts' discretion under the APPA and the range of permissible meaning that may be attributed to the public interest standard thereunder.

1. The *NBC* Decree Is Designed To Suppress Competition and Drive Up Prices.

Congress made it evident that its primary "public interest" concern in enacting the APPA was the protection of "the public by insuring healthy competition in the future". S. Rep. No. 298, 93d Cong., 1st Sess. 6 (1973); H. R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974). This decree most assuredly does not do so.

The decree places specific limits on NBC's production of programming. Such a restraint, except when of a

temporary nature and ancillary to a decree of divestiture (*e.g., Ford Motor Co.* v. *United States,* 405 U.S. 562, 575 n.10 (1972)), is unprecedented and inexplicable, except as a device to protect outside program suppliers from NBC's actual and potential competition and thus to increase their remuneration. In pursuit of its goal, the decree ignores the fundamental proposition that the antitrust laws "were enacted for 'the protection of *competition,* not *competitors', Brown Shoe Co.* v. *United States,* [370 U.S. 294, 320 (1962)]". *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488 (1977) (emphasis in original); *see Calnetics Corp.* v. *Volkswagen of America, Inc.,* 532 F.2d 674 (9th Cir.), *cert. denied,* 429 U.S. 940 (1976).

NBC's presence as a potential competitor, ready to expand in-house program production if prices rise above a competitive level, constitutes a substantial incentive to vigorous competition in program production. (Fisher Aff., App. 88a) The production limitations of Section V of the decree eliminate the substantial incentive to competition which NBC's potential production capacity represents.*

* Vertical and conglomerate acquisitions and mergers have been struck down precisely because they forestall potential independent entry by internal expansion which is "the sort of entry into a new market which Congress intended to encourage". *Bendix Corp.,* 77 F.T.C. 731, 825 (1970), *rev'd on other grounds,* 450 F.2d 534 (6th Cir. 1971); *see United States* v. *Philadelphia National Bank,* 374 U.S. 321, 370 (1963). The elimination of such potential independent entry has regularly been held likely substantially to lessen competition. *See, e.g., United States* v. *Falstaff Brewing Corp.,* 410 U.S. 526 (1973); *Ford Motor Co.* v. *United States,* 405 U.S. 562 (1972); *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158 (1964); *FTC* v. *Procter & Gamble Co.,* 386 U.S. 568 (1967); *United States* v. *Phillips Petroleum Co.,* 367 F. Supp. 1226 (C.D. Cal. 1973), *aff'd,* 418 U.S. 906 (1974). The Department would presumably have raised precisely this argument had NBC's elimination as a potential market entrant resulted from a merger with Warner Bros. or another program supplier.

As the District Court recognized, the decree does not attempt to improve the weal of suppliers by increasing the competition among buyers. The District Court repeatedly acknowledged that

> ". . . the judgment is *not* intended to enhance competition among the three television networks." (App. 64a, emphasis added; *see also id.* 61a, 80a)

Yet, in the absence of an increase in competition among the buyers, the only way the bargaining position of suppliers can be improved is by restraining competition among the suppliers. That, as CBS showed below, is precisely what the decree does.

To be sure, the District Court characterized the Antitrust Division's efforts to increase the market power of NBC's program suppliers, and thus "even out" the bargaining power of NBC and its suppliers, as "enhanc[ing] competition in the buying and selling of television programming". (App. 60a, 80a) But complex regulatory schemes such as that embodied in the decree, which are designed to displace the workings of the competitive system so as to "even out" supposedly uneven bargaining power and thus "improve the lot" of sellers at the expense of buyers or of some competitors at the expense of others, are not consistent with the procompetitive policy embodied in the Sherman Act. Congress has from time to time sought to restrain unfettered competition on the basis of a legislative determination that some disadvantaged group should receive more favorable treatment. The National Labor Relations Act, the National Industrial Recovery Act and the Agricultural Adjustment Act are conspicuous examples of that type of legislation. The Sherman Act, however, is not such a statute. As this Court instructed in *Northern Pac.*

Ry. v. *United States*, 356 U.S. 1, 4 (1958), ". . . the policy unequivocally laid down by the Act is competition."*

2. The District Court's View That a Decree Consistent with the Complaint and the Objectives of the Antitrust Division Ipso Facto Satisfies the Public Interest Standard of the APPA Is Erroneous.

Notwithstanding the anticompetitive effect of the restraints embodied in this decree, the District Court found the decree to be "consistent with" the theory of liability in the complaint and with the objectives of the Antitrust Division in the case and, so finding, determined that entry of the decree was in the "public interest".** (App. 61a, 77a, 80a) But approval of the decree on the ground of such consistency delegates to the Antitrust Division the very responsibility imposed on the courts by the APPA. A decree that seeks to enrich program producers by curtailing their competition cannot be found to be in the public interest simply because the Antitrust Division wants to achieve that

* *Cf. United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 611 (1972) (decisions "to sacrifice competition in one portion of the economy for greater competition in another" must be made by Congress, not by the courts); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 371 (1963) (anticompetitive merger not saved because deemed beneficial "on some ultimate reckoning of social or economic debits and credits").

** The only other factor to which the District Court alluded was the "additional confidence" it derived that the decree was in the "public interest" because objectors to the decree did not speak "with one voice"—some felt that the decree did "not go far enough" while others urged that the decree would "actually restrain otherwise healthy competition". (App. 77a) But a showing that this decree is inconsistent with policies and purposes of the Sherman Act cannot be balanced by claims that the decree does not go far enough in restricting competition. In all events, the unanimity with which every element of the "public" expressing its "interest" has denounced the decree is a most peculiar basis for "additional confidence" that the decree is "in the public interest".

result. Congress enacted the APPA precisely because it was concerned with the possibility of executive misfeasance and concluded that judicial review of antitrust consent decrees was required. *See* Note, *Construction and Modification of Antitrust Consent Decrees: New Approaches After the Antitrust Procedures and Penalties Act of 1974*, 77 COLUM. L. REV. 296, 307-08 (1977).

The APPA commands the district court, not the Antitrust Division, to "determine", as a condition precedent to the entry of an antitrust consent decree, that the decree is "in the public interest". Congress intended to mandate an "independent" judicial assessment to eliminate "judicial rubber stamping" of Antitrust Division consent decrees and to "impose a check" on the Antitrust Division's discretion. *United States* v. *Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975); *see also* S. Rep. No. 298, 93d Cong., 1st Sess. 4-6 (1973); H. R. Rep. No. 1463, 93d Cong., 2d Sess. 8-9 (1974).*

* The government itself pointed out in hearings leading to adoption of the APPA that a district court's public interest inquiry is meant to "encompass not only whether the relief is adequate in view of that sought in the complaint, but whether the Government sought appropriate relief in the complaint itself". The Antitrust Procedures and Penalties Act: Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary. United States Senate, 93d Cong., 1st Sess. 93 (1973) (testimony of Hon. Thomas E. Kauper, Assistant Attorney General, Antitrust Division, United States Department of Justice); Consent Decree Bills: Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, 93d Cong., 1st Sess. 62 (1973) (testimony of Hon. Bruce B. Wilson, Deputy Assistant Attorney General, Antitrust Division, United States Department of Justice).

Deference to the Department of Justice is particularly inappropriate in this case where NBC (and CBS and ABC) pleaded as a defense (which the District Court sustained on motion to strike) that this litigation was commenced as a result of the unconstitutional prosecutorial purpose of restraining, intimidating and inhibiting criticism of President Nixon and his administration.

United States v. *Gillette Co., supra,* the only decision applying the APPA cited by the District Court, stands in stark contrast to the procedures followed in the *NBC* case. In *Gillette,* a proposed consent decree was approved by Judge Aldrich only after repeated hearings and a number of judicially-inspired modifications designed to make the decree more procompetitive. As Judge Aldrich noted:

> "The legislative history [of the APPA] shows clearly that Congress did not intend the court's action to be merely pro forma, or to be limited to what appears on the surface. Nor can one overlook the circumstances under which the act was passed, indicating Congress' desire to impose a check not only on the government's expertise—or at the least, its exercise of it—but even on its good faith." 406 F. Supp. at 715.

3. The Refusal of the District Court To Permit the Adversary, Evidentiary Hearing Authorized by 15 U.S.C. § 16(f)(1) and (3) Was a Gross Abuse of Discretion in the Circumstances of this Case.

There is no basis on the current state of the record for a finding that the decree is "in the public interest", as required by the APPA. The only evidentiary material before the court was the unrebutted proof submitted by CBS that the decree was anticompetitive, and hence inconsistent with the public interest. As a result, unless the Final Judgment is to be rejected outright, as we believe it should be, the District Court must conduct further proceedings to determine whether there is any conceivable basis for entry of this Final Judgment.

One of the procedures explicitly authorized by the APPA in these circumstances is a hearing at which the district court shall "take testimony of Government officials or experts or such other expert witnesses . . . as the court may deem appropriate". (15 U.S.C. § 16(f)(1)) The APPA provides for "participation" by "interested persons" at such a hearing. (15 U.S.C. § 16(f)(3)) CBS moved the court below for such an adversary and evidentiary hearing, but the court entered the Final Judgment without ruling on CBS's motion and even before its return date.

While it was clearly not the intent of Congress in adopting the APPA to require a "hearing or trial on the public interest issue" in every case (S. Rep. No. 298, 93d Cong., 1st Sess. 6 (1973)), Congress did expressly authorize a district court to hold such a hearing where appropriate (15 U.S.C. § 16(f)). In the unprecedented circumstances of this case, a hearing was not only appropriate but imperative:

> (1) The decree and the Competitive Impact Statement were attacked by some 70 companies, associations and individuals, representing every element of the affected industry as well as public interest groups;
>
> (2) CBS made an evidentiary showing, *inter alia,* that the proposed decree would suppress competition and subvert the purposes of the antitrust laws; and
>
> (3) Neither plaintiff nor NBC offered any evidentiary support to justify entry of the decree.

The District Court itself acknowledged the need for "a major inquiry" into the potential anticompetitive effect on the television industry of this Final Judgment. (See p. 8 *supra.*) Such an "inquiry", if it is to be conducted, cannot be confined to the inner sanctum of judicial chambers. More is called for. Having recognized the need for "a major inquiry" the District Court should have accepted the offer of adversarial assistance. As Senator Edward M.

Kennedy, then Acting Chairman of the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, noted with respect to the proposed Final Judgment:

> "It seems to me wholly inappropriate for a major policy decision of this potential impact to be decided without a complete record and in the context of a non-litigated consent decree with one network." 42 Fed. Reg. 25055 (1977).

The purpose of the APPA is to encourage and to facilitate participation in consent decree proceedings by "interested persons" who oppose entry of the decree, thus offering to the trial court the benefits of adversary proceedings which the parties, because of their consent to the entry of judgment, are simply not in a position to provide. *See United States* v. *Gillette, supra; cf. United States* v. *CIBA Corp.*, 50 F.R.D. 507 (S.D.N.Y. 1970). Effectuation of the purposes of the APPA requires an adversary proceeding of some type when substantial questions are raised concerning the "public interest" character of a proposed consent judgment. Indeed, it is an assumption of our entire judicial system, and the policy of the "case or controversy" requirement of Article III of the Constitution, that substantive "judicial" action is appropriate only upon the adversarial presentation of contested issues. *See United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961).

But in this case, the District Court completely ignored the discretionary fact-gathering and adversarial procedures provided by the APPA, such as intervention, references to masters, solicitation of federal agency views, appearances *amicus curiae*, evidentiary hearings, and limited or full participation by "interested persons". (15 U.S.C. § 16(f)) The District Court chose to shield itself from

any adversary presentation whatsoever. It did so in the face of a substantial evidentiary showing by CBS of the probable anticompetitive effects of the Final Judgment and in the teeth of unprecedented and unanimous condemnation of the Final Judgment by every segment of the affected industry. Yet, the language and the policies of the APPA, the "case or controversy" mandate of Article III of the Constitution, and common notions of due process, all require that there be a full ventilation of the pros and cons of a consent judgment and an informed, reasoned and articulated determination that entry of a consent judgment proposed by plaintiff is in the "public interest".

4. The Erroneous Standard Adopted by the District Court Substantially Prejudiced a Proper Assessment of the "Public Interest" as Declared in the Communications Act and the First Amendment.

At the very outset of this litigation the District Court recognized that accommodating equitable relief to the pervasive regulatory scheme of the FCC would present "a real and substantial problem" to which the court would have to attend in fashioning a decree.* Following the submission of the proposed decree, the court again noted the "serious" issue involved in reconciling the proposed decree with the ongoing regulatory activities of the FCC.** (App. 66a) Nevertheless, in entering the decree, without even soliciting the views of the FCC, the court gave short shrift

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* *United States* v. *National Broadcasting Co.*, 1974-1 Trade Cas. ¶ 74,885, at 95,992 (C.D. Cal. 1973).

** The District Court recognized (App. 65a) that many, if not all, of the provisions of the *NBC* decree—provisions characterized by the Antitrust Division as "regulatory" (Competitive Impact Statement at 9, 41 Fed. Reg. 52015, 52023 (1976))—are the subject of a pending inquiry by the FCC. *See In The Matter of Commercial Television Network Practices and the Ability of Station Licensees to Serve the Public Interest*, Notice of Inquiry, F.C.C. Docket No. 21049, 42 Fed. Reg. 4992 (1977).

to that "real and substantial problem" and abdicated responsibility for achieving the necessary accommodation, saying that "the burden would fall on the [Federal Communications] Commission to formulate regulations not in conflict with outstanding judicial orders". (App. 66a)

Even assuming, *arguendo,* that the District Court's decision to put "the burden" on the FCC to avoid judicial-regulatory conflict would be appropriate *if* the court were enforcing the procompetitive policy of the Sherman Act, it is radically unsound where, as here, the court has established a system of regulation designed not to eliminate restraints on competition but to "improve the lot" of program suppliers. That objective must find sanction, if at all, in considerations of public policy quite different from those underlying the antitrust laws. But, under the public policy declared by the Communications Act, 47 U.S.C. §§ 151 *et seq.*, the task of formulating and implementing such notions of the public welfare with respect to the broadcast industry has been allocated to the FCC.* Thus, the entry of the decree and the District Court's preemption of the FCC's regulatory jurisdiction cannot be found to be in the public interest insofar as that interest is delineated by the Communications Act.

CBS had also urged that the decree's proposed ban on NBC's internal production of programs conflicts with the fundamental policy of the First Amendment. The District Court summarily rejected that argument, principally on the ground that CBS did not have "standing" to assert NBC's constitutional rights.

But the *NBC* decree's imposition of a clear and explicit prior restraint on NBC's ability to produce entertainment programs cannot properly be brushed aside on "standing"

* 47 U.S.C. § 303.

grounds. CBS was not asserting NBC's constitutional rights. CBS was objecting, as it had a right to do under the APPA, that the decree constituted a prior restraint on freedom of speech and of the press, thoroughly obnoxious to a fundamental public policy declared in the First Amendment, and thus that its entry by a federal district court with powers limited by the Constitution was contrary to the "public interest".*

5. Mandamus Sought by Adversely Affected Nonparties Is the Only Effective Vehicle for Appellate Review of APPA Determinations.

Given the APPA's mandate for increased judicial scrutiny of antitrust consent decrees, it is essential that this Court fashion some means of appellate oversight of district court determinations under the APPA lest district courts be accorded, through default, an unintended nonreviewable discretion thereunder. *See Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964).

The original parties to an APPA consent decree will, of course, not seek appellate review of the propriety of its entry, no matter how egregious the error and notwithstanding the most blatant adverse effects on the public interest. *Cf. Swift & Co.* v. *United States,* 276 U.S. 311, 330 (1928). The proper enforcement of the antitrust laws would therefore be frustrated by a refusal to entertain nonparty efforts to obtain appellate review in appropriate cases.

* Nor is the "commercial" character of NBC's business (or even of the speech itself) determinative under the First Amendment. It is clear that the First Amendment protects even what had heretofore been regarded as purely commercial speech, and that this constitutional protection takes precedence over even highly esteemed policies thought to justify a restriction on its application. *See Bates* v. *State Bar,* 433 U.S. 350 (1977); *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748 (1976); *Bigelow* v. *Virginia,* 421 U.S. 809 (1975); *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 266 (1964).

An adversely affected person, in the position of CBS here, should be permitted to pursue the remedy of mandamus to rectify manifest lower court failure to enforce the APPA.* The mandamus remedy has been afforded aggrieved nonparties in analogous circumstances. *See, e.g., United States* v. *Sherman,* 581 F.2d 1358 (9th Cir. 1978); *CBS Inc.* v. *Young,* 522 F.2d 234 (6th Cir. 1975).

Also, unlike the usual case, mandamus here does not involve "piecemeal litigation" that would undermine either the finality rule, 28 U.S.C. § 1291, or the carefully circumscribed congressional scheme governing interlocutory appeals, 28 U.S.C. § 1292. *See Will* v. *United States,* 389 U.S. 90, 96 (1967); *Kerr* v. *United States District Court,* 426 U.S. 394, 403 & n.6 (1976). Here we are dealing with a final judgment. Thus, the major policy consideration underlying the judicial hesitation to grant mandamus is not present in APPA consent decree cases.

Finally, CBS's petition for mandamus rests on considerations altogether different than those involved in its pending appeal from denial of its motion to intervene (see p. 8n.* *supra*). Irrespective of the scope and nature of the right to intervene as delineated by Fed. R. Civ. P. 24, the APPA expressly recognizes that nonintervening "interested persons" have a significant public interest role to play in proceedings at the district court level. Furthermore, district court actions calling for appellate

* We do not suggest that all interested persons are in a position to seek review by mandamus of all erroneous district court determinations under the APPA. Here, however, the purpose and effect of the decree is to restrain competition among program suppliers at the expense of program buyers. According to the Antitrust Division, CBS is one of only three such buyers. Hence, CBS is according to Government's own view one of a very few persons impacted by precisely those aspects of the *NBC* decree so clearly and indisputably contrary to the goals of the Sherman Act and of the APPA.

correction—such as the District Court's unexpected entry of the decree here without any hearing despite its previous undertaking to conduct a "major inquiry"—may come long after an intervention motion has already been denied, and too late in the proceedings for a new effort at intervention to be practicable. Since it is imperative that there be an appellate determination of the proper interpretation and application of the APPA and the public interest standard thereunder, the possibility of appellate scrutiny cannot properly be contingent upon the availability of intervention under Rule 24. The writ of mandamus, under these circumstances, affords a flexible and less intrusive means of providing the necessary guidance.

CONCLUSION

We respectfully submit that, in the absence of appellate scrutiny, the important purposes that Congress sought to serve in enacting the APPA can and, as the decision below shows, will be utterly frustrated.

For the reasons above stated, a writ of certiorari should issue to review the order of the United States Court of Appeals for the Ninth Circuit denying CBS's petition for mandamus.

May 7, 1979

Respectfully submitted,

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Supreme Court, U. S.
FILED
MAY 7 1979
MICHAEL RODAK, JR., CLERK

78-1685

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-

CBS INC.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (KELLEHER, D.J.), UNITED STATES OF AMERICA and NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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May 7, 1979

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Constitutional Provision and Statutes Involved

UNITED STATES CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

SHERMAN ACT, SECTION 1, 15 U.S.C. § 1

Trusts, etc., in restraint of trade illegal; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

SHERMAN ACT, SECTION 2, 15 U.S.C. § 2

Monopolizing trade a felony; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

ANTITRUST PROCEDURES AND PENALTIES ACT, 15 U.S.C. § 16(b)-(h)

(b) Consent judgments and competitive impact statements; publication in Federal Register; availability of copies to the public.

Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any response by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

(1) the nature and purpose of the proceeding;

(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained, and the anticipated effects on competition of such relief;

(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) a description of the procedures available for modification of such proposal; and

(6) description and evaluation of alternatives to such proposal actually considered by the United States.

(c) Publication of summaries in newspapers.

The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct—

(i) a summary of the terms of the proposal for consent judgment,

(ii) a summary of the competitive impact statement filed under subsection (b) of this section,

(iii) and a list of the materials and documents under subsection (b) of this section which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

(d) Consideration of public comments by Attorney General and publication of response.

During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b) of this section. The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

(e) Public interest determination.

Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific

injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

(f) Procedure for public interest determination.

In making its determination under subsection (e) of this section, the court may—

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) of this section concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

(g) Filing of written or oral communications with the district court.

Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b) of this section, each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

(h) Inadmissibility as evidence of proceedings before the district court and the competitive impact statement.

Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 15a of this title nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding.

Order of the Court of Appeals filed April 12, 1978

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 77-3215, 77-3381, 77-3852, 77-3975, 77-4057, 78-1067, 78-1068, 78-1223

D.C. #CV 74-3601-RJK
CENTRAL CALIFORNIA

—o—

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NATIONAL BROADCASTING COMPANY, INC.,
Defendant,

and

AMERICAN TELEVISION & COMMUNICATIONS CORP., *et al.*,
Applicants for Intervention Appellants.

—o—

ORDER

Before:

CHOY and SNEED, *Circuit Judges.*

Upon due consideration, the Court issues the following order:

• • •

(b) mandamus petitions Nos. 77-3975 and 77-4057 are denied;

• • •

/s/ HERBERT Y. C. CHOY
Herbert Y. C. Choy

/s/ JOSEPH T. SNEED
Joseph T. Sneed

United States Circuit Judges

FILED
Apr 12 1978
Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals

Order of the Court of Appeals filed February 5, 1979

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 77-3975, 77-4057

D.C. #CV 74-3601—RJK
CENTRAL CALIFORNIA

CBS, INC.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

UNITED STATES OF AMERICA, and
NATIONAL BROADCASTING COMPANY, INC.,

Real Parties in Interest.

ORDER

Before:

CHOY and SNEED, *Circuit Judges.*

Upon due consideration, the court issues the following order:

(a) the petitions for rehearing are denied; and

(b) the suggestions for rehearing en banc having been circulated to all active judges and no active judge having requested rehearing en banc, the suggestions for rehearing en banc are rejected.

FILED
Feb 5 1979
Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals

Complaint—*United States* v. *NBC*

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. CV 74-3601—RJK

(Equitable Relief Complaint for Violation of Sections 1 & 2 of the Sherman Act)

UNITED STATES OF AMERICA,

Plaintiff,

v.

NATIONAL BROADCASTING COMPANY, INC.,

Defendant.

COMPLAINT

The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendant named herein and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (15 U.S.C. § 4), as amended, commonly known as the Sherman Act, in order to prevent and restrain the continuing violation by the defendant, as hereinafter alleged, of Sections 1 and 2 of said Act (15 U.S.C. §§ 1, 2).

2. The defendant, National Broadcasting Company, Inc., whose West Coast studios and offices are in Burbank, California, transacts business within the Central District of California.

II

DEFINITIONS

3. As used herein:

(a) "Affiliate" means a television station which has an affiliation agreement with National Broadcasting Company, Inc., pursuant to wh'ch it receives television programs and advertising messages for broadcast, and receives compensation for the use of its time and facilities.

(b) "Prime evening hours" are the hours from 6:00 p.m. to 11:00 p.m. in the Eastern time zone of the United States.

(c) "Television entertainment programs" means all programs shown on television other than news, public affairs, documentary or sports programs.

(d) "Outside program supplier" means a producer or supplier of television entertainment programs other than a television network.

III

DEFENDANT

4. National Broadcasting Company, Inc. (hereinafter NBC) is hereby named as defendant. NBC is a corporation organized and existing under the laws of the State of Delaware. It is a subsidiary of the RCA Corporation. NBC owns and operates commercial television stations in five of the nation's leading television markets (New York City, Los Angeles, Chicago, Washington and Cleveland). NBC is engaged, among other things, in the operation of the NBC Television Network, which furnishes television programs and related advertising messages to approximately 200 affiliates located throughout the United States and to the television stations which are owned and operated by NBC. NBC remits part of the revenues it receives from advertisers to its affiliates. NBC itself produces some of the programs broadcast on its television network. NBC also owns various financial interests in programs produced by others and broadcast on its television network.

5. Although NBC is primarily engaged in television and radio network broadcasting, its parent, RCA Corporation, is engaged in the following activities, among others:

(a) Production, distribution and sale of phonograph records and tapes;

(b) Publishing through Random House, Inc., a wholly-owned subsidiary.

IV

TRADE AND COMMERCE

A. Interstate Commerce

6. Television programs and related advertising messages, filmed, taped and live, are conveyed by program suppliers and networks across State lines to television stations throughout the United States, from which stations said programs are transmitted across State lines to viewers. A continuous stream of interstate commerce and the use of interstate means of communication results therefrom, including the collection and payment of fees, voluminous written and frequent verbal communications, and substantial amounts of advertising copy, recordings, transcriptions, films, contracts and checks.

7. Commercial television programs are created and produced by television networks, outside program suppliers, television stations, and by motion picture studios, which supply feature films and other programs for television broadcast. In 1973, the three nationwide commercial television networks (NBC, CBS, Inc. (CBS) and American Broadcasting Companies, Inc. (ABC)) spent more than $1,000,000,000 for television programs, of which NBC spent more than $340,000,000. In 1973, total television broadcasting revenues for the aforementioned three networks were in excess of $1,400,000,000, of which NBC received more than $470,000,000.

B. Television Programming

8. There are approximately 700 television stations in the United States which broadcast commercial television

programs. Of these, about 200 stations have network affiliation agreements with NBC. During prime evening hours, when television viewing is at its peak, most of these stations depend upon NBC for virtually all of their television entertainment programming. A television entertainment program generally cannot reach the audiences of such stations during prime evening hours unless it is transmitted by NBC over the NBC Television Network.

9. The value of any television program to its producer, and to an advertiser whose message is broadcast in conjunction with it, depends in large part on the number of television viewers who see the program and observe the commercial messages. The largest television audiences in the United States are readily available only to those producers whose programs are carried by the NBC, CBS or ABC television networks, and to those advertisers whose commercial messages are broadcast during said programs, and the right to broadcast such programs and commercial messages on any of these three television networks can be purchased only from them.

10. Many advertisers formerly were able to purchase air time from networks (including NBC) and to purchase television entertainment programs from outside program suppliers for broadcast during such air time. Such advertisers constituted a substantial market for outside program suppliers. Now, however, the networks (including NBC) generally will not offer to sell air time to advertisers except for their commercial messages which are broadcast in conjunction with television entertainment programs already selected and placed in schedules by the networks. As a result, the three nationwide commercial television networks (NBC, CBS and ABC) constitute the primary market for television entertainment programs.

11. Most of the prime time television entertainment programs broadcast on the NBC Television Network have been programs which have either been produced by NBC itself or with respect to which NBC owns a right or interest in addition to a license to broadcast. In 1957, such programs constituted about 43 percent of the television entertainment programs broadcast on the NBC Television Network during prime time evening hours. By 1967, this figure had increased to 68 percent, or 74 percent if feature films are excluded.

12. The commercial value of a television entertainment program is not exhausted by its first network showing. Frequently thereafter a program is distributed to individual television stations in the United States for non-network broadcast. In addition, it may be distributed to foreign television stations while it is appearing over a domestic television network. The distribution of a television program to individual stations for non-network broadcast is known as syndication. NBC has obtained syndication and other valuable subsidiary program rights, as well as a share of the profits produced by such rights, with respect to a substantial number of television entertainment programs produced by others and broadcast on the NBC Television Network. In 1978, NBC sold its syndication rights to MTA Films, Inc., a subsidiary of National Telefilm Associates, Inc.

13. The use of motion picture feature films as prime time television entertainment programs has shown a marked increase in recent years. In the early nineteen sixties, the three nationwide commercial television networks began using feature films in prime time. By the 1967-1968 season, each network generally carried motion picture

feature films on two nights a week, usually from 9:00 to 11:00 p.m. EST, and feature films were thus available to television network audiences six nights a week. This practice has continued to date. In 1966, NBC contracted with MCA, Inc., for the production of motion picture feature films for exhibition on the NBC Television Network. In 1967, both CBS and ABC announced plans to produce feature-length motion picture films and to distribute those films for exhibition in motion picture theaters and for exhibition on their respective television networks.

14. The successful production of both television entertainment programs and feature films depends to a large degree on the utilization of skilled writers, actors, directors, producers and related talent. Only the three nationwide commercial television networks can assure such talent both television and theatrical exposure for the talent and its product. In addition, because of their control over access to their affiliates, the networks are in a unique position to assure themselves of nationwide television network revenues for feature films which they produce, after those films have completed theatrical runs.

V

OFFENSES CHARGED

15. For many years prior to the date hereof and continuing up to and including the date of filing of this complaint, defendant NBC has engaged in a combination with its owned and operated television stations, the NBC affiliates and others, and has entered into contracts, in unreasonable restraint of trade and commerce in television entertainment programs exhibited on the NBC Television

Network during prime evening hours, in violation of Section 1 of the Sherman Act.

16. For many years prior to the date hereof and continuing up to and including the date of filing of this complaint, defendant NBC has engaged in a combination with its owned and operated television stations, the NBC affiliates and others to monopolize, has attempted to monopolize and has monopolized the trade and commerce in television entertainment programs exhibited on the NBC Television Network during prime evening hours, in violation of Section 2 of the Sherman Act.

17. Pursuant to said offenses, defendant NBC has used its control over access to the broadcasting time of the NBC Television Network during prime evening hours:

(a) To exclude television entertainment programs in which NBC had no ownership interest from broadcast on the NBC Television Network during prime evening time;

(b) To compel outside program suppliers to grant to it financial interests in television entertainment programs produced by them;

(c) To refuse to offer program time alone to advertisers and other outside program suppliers;

(d) To control the prices paid by NBC for television exhibition rights to motion picture feature films distributed by non-network motion picture distributors;

(e) To obtain a competitive advantage over other producers and distributors of television entertainment programs and of motion picture feature films.

18. The offenses alleged in this complaint are continuing and will continue unless the relief hereinafter prayed for is granted.

VI

EFFECTS

19. The effects of the aforesaid offenses, among others, have been and are as follows:

(a) Ownership and control of television entertainment programs broadcast during prime evening hours on the NBC Television Network has been concentrated in defendant NBC;

(b) Competition in the production, distribution and sale of television entertainment programs, including feature films, has been unreasonably restrained;

(c) Competition in the sale of television entertainment programs to the NBC Television Network by outside program suppliers of said programs has been unreasonably restrained;

(d) The viewing public has been deprived of the benefits of free and open competition in the broadcasting of television entertainment programs.

PRAYER

WHEREFORE, the plaintiff prays:

1. That the offenses described in paragraph 15 of this complaint be adjudged and decreed to be in violation of Section 1 of the Sherman Act.

2. That the offenses described in paragraph 16 of this complaint be adjudged and decreed to be in violation of Section 2 of the Sherman Act.

3. That the defendant NBC be prohibited from obtaining any interest (except for the first-run right of exhibition) in television entertainment programs produced by others, including feature films.

4. That the defendant NBC be prohibited from engaging in syndication of any television entertainment programs.

5. That the defendant NBC be prohibited from transmitting for exhibition over the NBC Television Network any television entertainment programs, including feature films, produced by the defendant NBC or any other commercial television network, and from allowing any television entertainment programs produced by NBC to be transmitted over any other commercial television network.

6. That the defendant NBC be prohibited from using its control of access to the broadcasting time of the NBC Television Network, the NBC owned and operated television stations or the NBC affiliates, to foreclose competition or obtain an unfair competitive advantage in any other field.

7. That the plaintiff have such other relief by way of divorcement, divestiture, reorganization and injunction with respect to the business and properties of the defendant NBC as the Court may consider necessary or appropriate to dissipate the effects of the defendant's unlawful activities as hereinbefore alleged in this complaint, and to restore competitive conditions to the television entertainment program industry.

8. That plaintiff have such other and further relief as the nature of the case may require and the Court may deem just and proper.

9. That the plaintiff recover the costs of this action.

/s/ WILLIAM B. SAXBE
William B. Saxbe
Attorney General

/s/ THOMAS E. KAUPER
Thomas E. Kauper
Assistant Attorney General

/s/ BADDIA J. RASHID
Baddia J. Rashid

/s/ JAMES J. COYLE
James J. Coyle
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Bernard M. Hollander
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/s/ HARRY G. SKLARSKY
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/s/ BARRY J. KAPLAN
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/s/ JAMES A. GILBERT
James A. Gilbert
Attorneys, Department of Justice

FILED
Dec 10, 1974
Clerk U.S. District Court
Central District of California

Final Judgment—*United States* v. *NBC*

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Cv No. 74-3601-RJK

———o———

UNITED STATES OF AMERICA

Plaintiff,

v.

NATIONAL BROADCASTING COMPANY, INC.,

Defendant.

———o———

Final Judgment

Plaintiff, United States of America, having filed its complaint herein on December 10, 1974, and defendant, National Broadcasting Company, Inc., having filed its answer herein on December 30, 1974, by their respective attorneys, each having consented to the entry of this Final Judgment, without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or admission by any party with respect to any issue of fact or law in any action or proceeding;

NOW, THEREFORE, before any testimony has been taken, the Court being advised and having considered the matter, it is hereby:

ORDERED, ADJUDGED AND DECREED as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states a

claim upon which relief may be granted against defendant under the provisions of Sections 1 and 2 of the Act of Congress of July 2, 1890, 15 U.S.C. §§ 1, 2, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," as amended, commonly known as the Sherman Act.

II.

As used in this Final Judgment:

(A) "Person" means an individual, partnership, corporation or any other form of legal or business entity.

(B) "NBC" means the National Broadcasting Company, Inc. and its subsidiaries.

(C) A "person controlling NBC" means any person owning at least ten percent (10%) of, or a controlling share of, the outstanding voting stock of NBC.

(D) "NBC Television Network" means an NBC owned or operated business which provides television programs and related advertising messages to affiliated television broadcast stations.

(E) "Entertainment Program" means any program, including a feature film, exhibited or intended to be exhibited on television other than the following programs: news, public affairs, agricultural, religious, instructional, and sports (as those terms are defined in Appendix A to this Final Judgment). The inclusion of incidental or occasional entertainment or non-entertainment elements in a program or program series shall not be deemed to change the classification of the program or program series.

(F) "Independent Program Supplier" means a person who produces or offers one or more entertainment programs

for network exhibition, other than NBC, a person controlling NBC, or a person in which NBC or a person controlling NBC has an ownership interest.

(G) "Network Exhibition" means the initial and repeat exhibitions of a television program on the NBC television network during the term of any agreement between NBC and an independent program supplier for such exhibition of such program.

(H) "Prime Time Hours" means the hours from 6:00 p.m. to 11:00 p.m. in the Eastern and Pacific Time Zones of the United States, and the hours from 5:00 p.m. to 10:00 p.m. in the Central and Mountain Time Zones of the United States.

(I) "Daytime Hours" means the hours from 9:00 a.m. to 6:00 p.m. in the Eastern and Pacific Time Zones of the United States, and the hours from 9:00 a.m. to 5:00 p.m. in the Central and Mountain Time Zones of the United States.

(J) "Fringe Hours" means the hours from 11:00 p.m. to 2:00 a.m. and 6:00 a.m. to 9:00 a.m. in the Eastern and Pacific Time Zones of the United States, and the hours from 10:00 p.m. to 1:00 a.m. and 6:00 a.m. to 9:00 a.m. in the Central and Mountain Time Zones of the United States.

(K) "Television Broadcast Station" means a station licensed as a television broadcast station by the Federal Communications Commission.

(L) "NBC Production Facilities" means studio facilities, including but not limited to, scenery, props and other production equipment, which are used for the production of entertainment programs exhibited or intended to be exhibited on television, and which are owned or leased by NBC, by any person controlling NBC, or by any person in

which NBC or any person controlling NBC has any ownership interest.

(M) "Stripping" means the broadcasting of more than one (1) episode per week of a television program series.

(N) "Broadcast Year" means the television broadcast year customarily commencing in September of one year and continuing until September of the following year.

III.

The provisions of this Final Judgment are applicable to NBC, to any person controlling NBC and to each of NBC's directors, officers, agents, employees, subsidiaries, successors, and assigns, and to all persons in active concert or participation with any of them, who receive actual notice of this Final Judgment by personal service or otherwise.

IV.

NBC is enjoined and restrained from:

(A) Acquiring any financial or proprietary right or interest in the exhibition, distribution, or other commercial use of any television program produced wholly or in part by an independent program supplier, other than the right to the Network Exhibition of the program, except as provided in Section VIII(A)-(D) of this Final Judgment, *provided that* an agreement granting NBC the right to Network Exhibition may include provisions concerning subject matters incident to the licensing and use of network programs, of which the following are examples: geographic scope and manner of transmission and delivery of network broad-

casts; approval of creative elements and program content; technical quality and delivery requirements; union and Equal Employment Opportunity Act compliance; act of God; force majeure; preemptions; obligations to pay for, rather than play, programs; number of episodes or programs ordered; assignability; warranties; indemnification; completion bonds; security agreements and financing statements; insurance; public morals; advertising conflicts; advertising, promotion and publicity of programs; audience testing and screening; cancellation; exclusivity for talent and creative personnel; exclusive exhibition rights (except as limited by Sections VI(E)(ii)-(iii) herein); pilots (except as limited by Section VI(F) herein); options (except as limited by Sections VI(E)(i), VI(F) and VI(G) herein); first negotiation and first refusal rights (except as limited by Sections VI(E)(i) and VI(G) herein); spinoffs (except as limited by Section VI(G) herein); repeats (except as limited by Section VI(H) herein); same day protection against once weekly syndication programs and theatrical feature films; title protection for the length of the applicable contract or contracts; format and continuing character protection; breach; and remedies, so long as any such provision does not violate the antitrust laws.

(B) Selling, licensing, or distributing entertainment programs to television broadcast stations for non-network television exhibition (or otherwise engaging in the business commonly known as "syndication"), or to foreign television stations or networks, except as provided in Section VIII(D) of this Final Judgment.

V.

(A) NBC is enjoined and restrained for a period of ten (10) years from the effective date of this Section from offering for NBC network broadcast during Prime Time Hours, Daytime Hours or Fringe Hours, more than two and one-half (2½) hours per week in Prime Time Hours, more than eight (8) hours per week in Daytime Hours, and more than eleven (11) hours per week in Fringe Hours, determined on the average per compliance period, of entertainment programs obtained from sources other than independent program suppliers, *provided that* during each compliance period NBC may add to the total number of allowable hours of entertainment programming from sources other than independent program suppliers, two (2) non-regularly scheduled special programs, and *provided further that* in any compliance period, NBC may, during Fringe Hours, increase the number of allowable hours of entertainment programming from sources other than independent program suppliers by reducing to the same extent the number of allowable hours of such programming in Prime Time Hours and/or Daytime Hours.

(B) For purposes of this Section V, compliance periods shall be consecutive semi-annual periods commencing at the start of each broadcast year. Compliance reports in the form set forth in Appendix B to this Final Judgment shall be submitted by NBC to plaintiff within thirty (30) days following the conclusion of each compliance period.

VI.

NBC is enjoined and restrained:

(A) From purchasing or offering to purchase from an independent program supplier the right to Network Exhibition of one or more entertainment programs upon the condition, express or implied, that NBC, or any person

controlling NBC, will obtain any other right or interest from said supplier, except as to contractual provisions concerning subject matters incident to the licensing and use of network programs as provided in Section IV(A) of this Final Judgment.

(B) For a period of fifteen (15) years from the effective date of this Section, from purchasing or offering to purchase from an independent program supplier any right to the exhibition of a program, other than a live program, as an NBC television network entertainment program upon the condition, express or implied, that said supplier produce the program, in whole or in part, utilizing NBC production facilities.

(C) For a period of fifteen (15) years from the effective date of this Section from agreeing with an independent program supplier that said supplier use NBC production facilities to produce a program, other than a live program, as an NBC television network entertainment program for a period in excess of the time required to produce episodes for one (1) broadcast year, *provided that* NBC and said supplier are not precluded each year from negotiating and contracting for additional periods not to exceed one (1) year each.

(D) For a period of ten (10) years from the effective date of this Section from purchasing or offering to purchase from CBS Inc. ("CBS") or American Broadcasting Companies, Inc. ("ABC") any right to Network Exhibition of any entertainment program upon the condition, express or implied, that CBS or ABC agrees to purchase or offers to purchase a right to network exhibition of any entertainment program produced or controlled by NBC.

(E) For a period of fifteen (15) years from the effective date of this Section from:

(i) Acquiring from an independent program supplier options for Network Exhibition of a prime time network entertainment program series exercisable for a period in excess of four (4) years from the date of first broadcast of an episode of such program as part of an NBC prime time television network entertainment program series, and the balance of any broadcast year in which such four (4) year period ends, *provided that* nothing herein shall prevent NBC, after the date of first broadcast, from negotiating new provisions which may include the purchase of an extension of the option period to five (5) years from the date of first broadcast, and the balance of any broadcast year in which such five (5) year period ends, and, at the end or during the final year of any contract term, from negotiating for and entering into new agreements with said supplier so long as the options acquired under any such new agreements do not exceed a period of four (4) years from the date of first broadcast of an episode under such new agreements, and the balance of any broadcast year in which such four (4) year period ends, plus the right to negotiate for and acquire a fifth option year, and *provided further that* nothing herein shall prevent NBC from acquiring first negotiation and first refusal rights for new agreements with said supplier so long as any such first refusal rights shall not be more favorable to NBC than a contractual obligation which prevents said supplier from entering into an agreement with a person other than NBC on terms

less favorable to said supplier than said supplier's last offer to NBC without giving NBC the first opportunity to meet such terms, and *provided further that* nothing herein shall prevent NBC from entering into contractual provisions incident to the licensing and use of network programs as provided in Section IV(A) of this Final Judgment.

(ii) Acquiring from an independent program supplier, after thirty (30) days from the entry of this Final Judgment, exclusive exhibition rights for prime time network entertainment program series episodes for which NBC has exercised a contractual right to Network Exhibition, in excess of the following:

(a) for prime-time use, the duration of any contract term or terms by which NBC acquires the right to Network Exhibition;

(b) for non-prime-time stripping on television broadcast stations, four (4) years from the first prime time episode broadcast; and

(c) for all other broadcast uses, three (3) years from the first prime time episode broadcast,

provided that nothing herein shall prevent NBC from negotiating for and acquiring rights, including exclusive rights, for stripping and once weekly exhibition to be utilized after the periods of exclusivity set forth above, so long as negotiation for and acquisition of such rights takes place after NBC has agreed to order episodes of such program for the first year of broadcast as an NBC prime time television network entertainment program series, and *provided*

further that nothing herein shall prevent NBC from acquiring exclusive exhibition rights to series episodes for the broadcast year for which such episodes are ordered.

(iii) Acquiring from an independent program supplier, after thirty (30) days from the entry of this Final Judgment, exclusive exhibition rights for theatrical feature films for which NBC has a contractual right to Network Exhibition, against:

(a) theatrical and non-theatrical direct projection;

(b) closed circuit TV in non-residential hotels, motels, bars, restaurants, hospitals and similar non-residential institutions;

(c) passenger-carrying vehicles;

(d) video discs, cartridges or cassettes or other such equipment.

(F) For a period of ten (10) years from the effective date of this Section, from acquiring from an independent program supplier a first year pick-up option for exhibition of a prime time network entertainment program series based on a program designated by NBC and said supplier as a "pilot program" ("pilot") which is exercisable after the following times:

(i) where NBC has not advanced said supplier any part of the costs of pilot development, subsequent to the earliest date that the agreement contemplates that broadcast of the series may commence; and

(ii) where NBC has advanced said supplier any part of the costs of pilot development, more than one (1) year after delivery to NBC of the completed pilot, *provided that* as to those series which NBC does not include in the network schedule at the earliest date that the agreement contemplates that broadcast of the series may commence:

(a) for those pilots which have been delivered to NBC between October 2 of one year and April 1 of the following year, NBC must designate by June 1 of the latter year sixty-five percent (65%) of such pilots as to which NBC will release its option for series exhibition upon payment to NBC of all of NBC's unrecouped costs for the development of such pilots; and

(b) for those pilots which have been delivered to NBC between April 2 and October 1 of the same year, NBC must designate by January 1 of the following year sixty-five percent (65%) of such pilots as to which NBC will release its option for series exhibition upon payment to NBC of all of NBC's unrecouped costs for the development of such pilots;

and *provided further that* NBC may purchase additional first year pick-up options for series which NBC has not designated for release and for series which NBC has designated for option release but which NBC wishes to retain, so long as such additional options are acquired, for pilots described in Section VI(F)(ii)(a), after June 1, or after the announcement of the NBC television network schedule for the next broadcast year,

whichever is later, and, for pilots described in Section VI(F)(ii)(b), after December 1, and so long as such additional options do not exceed increments of six (6) months.

For purposes of this Section VI(F):

A pilot shall be deemed to have been delivered to NBC when NBC has received, in the case of a film pilot, an answer print, and, in the case of a tape pilot, a program complying with customary tape requirements.

In computing the number of pilots to be released under Sections VI(F)(ii)(a) and (b), any fraction of a pilot shall be rounded off to the next lower whole number.

Unrecouped costs shall be deemed to be the amount of money advanced by NBC to an independent program supplier for the development of a pilot, except that if the NBC television network broadcasts a pilot once, two-thirds (⅔) of NBC's costs shall be deemed to have been recouped, and if NBC broadcasts a pilot more than once, all of NBC's costs shall be deemed to have been recouped.

(G) For a period of ten (10) years from the effective date of this Section, from acquiring from an independent program supplier rights in excess of first negotiation and first refusal rights for a spinoff involving a non-continuing character.

For purposes of this Section VI(G):

First refusal rights shall not be more favorable to NBC than a contractual obligation which prevents

said supplier from entering into an agreement with a person other than NBC on terms less favorable to said supplier than said supplier's last offer to NBC without giving NBC the first opportunity to meet such terms.

A non-continuing character shall be deemed to mean one who appeared in no more than twenty-five percent (25%) of the original episodes of the program upon which such spinoff is based during the twelve (12) months prior to the time exhibition rights to such spinoff are offered for licensing by said supplier.

(H) For a period of ten (10) years from the effective date of this Section, from purchasing from an independent program supplier a right to first run Network Exhibition of any television entertainment program series which includes the right to exhibit repeats of episodes in years subsequent to the broadcast year of initial exhibition of such episodes, *provided that* repeat rights to three (3) initial episodes per broadcast year of each such program series may be purchased for exhibition in subsequent broadcast years as part of the right to Network Exhibition, and *provided further that* additional rights to repeats may be purchased for exhibition in subsequent broadcast years, so long as negotiation for and acquisition of such additional repeat rights takes place after NBC has agreed to order episodes of such program series for the first year of broadcast as an NBC television network entertainment program series, and *provided further that* the limitation as to the use of repeats contained in this Section VI(H) shall not apply to (i) made-for-television and theatrical feature films, (ii) specials, and (iii) cartoons or other children's programs.

VII.

The following Sections of this Final Judgment shall not take effect until similar injunctive relief is obtained in Final Orders, Judgments or Decrees entered against CBS in *United States* v. *CBS Inc.*, Civil Action No. 74-3599-RJK (C.D. Cal.), and against ABC in *United States* v. *American Broadcasting Companies, Inc.*, Civil Action No. 74-3600-RJK (C.D. Cal.) which are not appealable or from which no timely appeal is taken: V, VI(C), VI(E)(i), and VI(F) through (H).

VIII.

Nothing contained in this Final Judgment shall be construed:

(A) To prohibit NBC from acquiring rights for non-network broadcast of programs by NBC-owned and operated television broadcast stations where such rights are not acquired, directly or indirectly, in connection with the negotiation for or acquisition of rights including renewal rights, for the exhibition, distribution or use of any program as an NBC television network program.

(B) To prohibit NBC from seeking repayment, in whole or in part, of money or other consideration loaned, advanced or furnished by NBC in connection with the development or production of a television network program or of a project or activity that may result in a television network program, to the extent of the amount loaned, advanced or furnished, including interest.

(C) To prohibit NBC from acquiring rights with respect to non-broadcast uses, including but not limited to publication of books or music, where such

rights are not acquired, directly or indirectly, in connection with the negotiation for or acquisition of rights, including renewal rights, for the exhibition, distribution or use of any program as an NBC television network program.

(D) To prohibit NBC from selling, licensing, or distributing outside the United States programs (i) produced in foreign countries and not included in NBC's television network schedule, where the acquisition of such distribution rights is not conditioned, directly or indirectly, upon the negotiation for or acquisition of rights, including renewal rights, for the exhibition, distribution or use of any program as an NBC television network program, or (ii) produced by NBC, by any person controlling NBC, or by any person in which NBC or any person controlling NBC has any ownership interest.

IX.

If a Final Order, Judgment or Decree is entered with respect to CBS in *United States* v. *CBS Inc.*, Civil Action No. 74-3599-RJK (C.D. Cal.), or with respect to ABC in *United States* v. *American Broadcasting Companies, Inc.*, Civil Action No. 74-3600-RJK (C.D. Cal.), which is not appealable or from which no timely appeal is taken, which shall order or decree for either CBS or ABC injunctions different in terms or provisions than those required by this Final Judgment, or which shall result in the dismissal of either or both of such actions. NBC may apply to the Court and shall be granted a modification of or relief from any terms set forth herein as may be necessary to prevent NBC

from being placed at a competitive disadvantage with respect to CBS or ABC.

X.

(A) Within thirty (30) days after the entry of this Final Judgment, NBC shall furnish to its officers, directors, and appropriate employees and agents a copy of this Final Judgment, and each year for a period of ten (10) years thereafter NBC shall furnish a copy to all new officers, directors and appropriate employees and agents. NBC shall maintain a file listing all persons to whom it has furnished such copies.

(B) Within thirty (30) days after entry of this Final Judgment and once each year during the succeeding ten (10) calendar years following entry of this Final Judgment, NBC shall send a copy of this Final Judgment to the last known address of each independent program supplier known to have offered any entertainment program to NBC for inclusion in its schedule of NBC television network programs within the preceding five (5) years and to each person listed in the then current issue of Television Factbook as a provider of television production facilities.

XI.

(A) For the purpose of determining or securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on rea-

sonable notice to NBC made to its principal office, shall be permitted, subject to any legally recognized privilege:

(1) access during the office hours of NBC to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of NBC relating to any matter contained in this Final Judgment; and

(2) subject to the reasonable convenience of NBC and without restraint or interference by it, the right to interview officers or employees of NBC, who may have counsel present, regarding any such matter.

(B) NBC, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, made to its principal office, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be requested.

No information obtained by the means provided in this Section XI shall be divulged by any representative of plaintiff to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XII.

Jurisdiction is retained by this Court for the purpose of enabling either party to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

XIII.

Entry of this Final Judgment is in the public interest.

Dated: November 23, 1977

/s/ ROBERT J. KELLEHER

UNITED STATES DISTRICT JUDGE

ENTERED
November 28, 1977
Clerk, U.S. District Court
Central Division of California

APPENDIX A*

(a) "Agricultural programs" include market reports, farming, or other information specifically addressed, or primarily of interest, to the agricultural population.

(b) "News programs" include reports dealing with current local, national, and international events, including weather and stock market reports; and when an integral part of a news program, commentary, analysis, and sports news.

(c) "Public affairs programs" include talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, round tables, and similar programs primarily concerning local, national, and international public affairs.

(d) "Religious programs" include sermons or devotionals; religious news; and music, drama, and other types of programs designed primarily for religious purposes.

(e) "Instructional programs" include programs (other than those classified under Agricultural, News, Public Affairs, Religious or Sports) involving the discussion of, or primarily designed to further an appreciation or understanding of, literature, music, fine arts, history, geography, and the natural and social sciences; and programs devoted to occupational and vocational instruction, instruction with respect to hobbies, and similar programs intended primarily to instruct.

(f) "Sports programs" include play-by-play and pre- or post-game related activities and separate programs of sports instruction, news or information (e.g., fishing opportunities, golfing instructions, etc.).

* Taken from 47 C.F.R. § 73.670, n.1 (1975).

APPENDIX B

COMPLIANCE REPORT

NBC PRODUCED PROGRAMS

Compliance Period .....

No. weeks .....

Prime Time Hours

Entertainment:

Program Name	No. Minutes Per Week	No. Weeks Offered For Network Broadcast

Non-Entertainment:

Program Name	No. Minutes Per Week	No. Weeks Offered For Network Broadcast

Daytime Hours

Entertainment:

Program Name	No. Minutes Per Week	No. Weeks Offered For Network Broadcast

Non-Entertainment:

Program Name	No. Minutes Per Week	No. Weeks Offered For Network Broadcast

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APPENDIX B

Fringe Hours

Entertainment:

Program Name	No. Minutes Per Week	No. Weeks Offered For Network Broadcast

Non-Entertainment:

Program Name	No. Minutes Per Week	No. Weeks Offered For Network Broadcast

Memorandum of Decision Re Consent Decree

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Civil No. 74-3601-RJK

—o—

UNITED STATES OF AMERICA,

Plaintiff,

v.

NATIONAL BROADCASTING COMPANY, INC.,

Defendant.

—o—

MEMORANDUM OF DECISION RE CONSENT DECREE

I. INTRODUCTION

The government's complaint against National Broadcasting Company ("NBC"), alleging violations of the Sherman Act, was filed on December 10, 1974. NBC answered the complaint on December 30, 1974, and the action thereafter proceeded through various stages of discovery and pretrial motions. On November 17, 1976, presumably upon the completion of extensive negotiations, the government and NBC submitted to the Court a proposed final judgment by consent which, upon approval by the Court, resolves all claims between the parties and concludes the litigation.

Because this is a civil antitrust lawsuit brought by the United States, the terms and conditions of the *Antitrust Procedures and Penalties Act* ("APPA") apply. See 15 U.S.C. § 16 (1977 Supp.). APPA provides that the govern-

ment must publish any proposed consent judgment and receive public comments thereto and that before the Court may approve such a judgment, *it must determine that such judgment is in the public interest.* The Act authorizes, but does not require, the Court to adopt certain procedures to aid in its determination of the public interest question.

The proposed consent judgment and the competitive impact statement ("CIS") were published in the Federal Register on November 24, 1976; additionally, summaries of the judgment were published in local newspapers in the District of Columbia and Los Angeles, California. Thereafter the Court and the government received numerous comments on the judgment, and in due course the government responded to these comments, publishing all relevant documents in the Federal Register on May 16, 1977. Based on the comments received, certain changes were made in the proposed judgment, and on May 4, 1977, NBC and the government submitted to the Court an amended proposed final judgment. Now that the requirements of the APPA concerning publication and consideration of public comments have been satisfied, the matter is ripe for a judicial determination of whether the proposed judgment is in the public interest.

II. Background and Complaint

This litigation was commenced by the government in April of 1972 when it filed separate but similar complaints against ABC, CBS and NBC. Upon a motion by defendants to dismiss the actions on the ground that there had been noncompliance by the plaintiff with certain orders of Court, the Court, on November 13, 1974, dismissed the original actions without prejudice. Thereafter, on December 10,

1974, the government filed new complaints, again alleging the same violations of the Sherman Act as contained in the original complaint. These new complaints survived a repeated defense motion to dismiss on grounds of unconstitutional prosecutorial purpose and the case proceeded through discovery in pretrial proceedings. The Court also denied three other significant motions made on behalf of the defendants: (1) a motion for summary judgment on the Sherman Act claims; (2) a motion to dismiss on the ground of exclusive jurisdiction in the Federal Communications Commission; and (3) a motion to dismiss without prejudice or to stay on the ground of primary jurisdiction in the Federal Communications Commission.

The complaint alleges violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1970), in connection with NBC's practices and activities in producing, procuring, and distributing prime-time television programs. In general, the complaint challenges the control exerted by NBC over the production, acquisition and exhibition of television programs shown during the prime-time hours. To comprehend the allegations of the complaint, it is necessary to understand, at least on a rudimentary basis, the manner in which NBC procures and exhibits its prime-time television programming.

Of approximately 700 television stations in the United States which broadcast commercial television programs, about 200 stations have affiliation agreements with NBC. During prime-time evening hours, these stations depend upon NBC for virtually all of their television programs. In addition to the affiliated stations, NBC owns and operates stations in five of the nation's leading television markets—New York, Los Angeles, Chicago, Washington, and Cleveland. The government contends that with the power derived

from its control over the owned and affiliated stations, NBC has monopolized the trade in commerce of production of prime-time television programming shown on the NBC network, has attempted to monopolize such market, and has entered into combinations and agreements in restraint of trade, particularly as it contracts for the purchase of programs produced by independent producers.

Most of the programs shown on the NBC network have been produced either by NBC itself or by independent producers who sell rights, including the right of exhibition, to NBC. One of the practices challenged by the government in this action is NBC's custom of purchasing from independent program producers various rights in addition to the right of exhibition. The value of a television program is not exhausted by its first network showing. After the completion of its run on network television, a program may be distributed to individual television stations for non-network broadcast. It also may be distributed to foreign television stations for broadcast while appearing at the same time over a domestic television network. This distribution to individual stations for non-network broadcasting is known as syndication. The government contends that for a substantial number of programs produced by independent producers, NBC acquires the syndication rights and thereby derives a substantial portion of the ultimate profits produced by a television program. The government contends that NBC is able to purchase these valuable subsidiary rights from independent program producers because of its control of access to the NBC television network, and since CBS and ABC pursue the same practice, independent program producers must deal on network terms or not deal at all.

The complaint also focuses on the relationship between NBC and advertisers. At one time in the television industry, it was not uncommon for an advertiser to purchase air time from the networks and to purchase television programs from outside program suppliers for broadcast during such air time. The advertisers thus constituted a substantial market for the income of program producers and served as buyers in competition with the networks. The complaint charges that NBC now will not sell air time to advertisers for the exhibition of a television program, but will sell only time for commercial messages, broadcast in conjunction with a program already selected by NBC. It is claimed this practice has removed advertisers as a competitive force in the purchase and sale of television programming and has left the three networks as the primary market for outside program suppliers.

It is charged that in furtherance of this monopoly over the market of television programming shown on its network, NBC has engaged in the following acts:

(a) excluded television programs in which NBC had no ownership interest from broadcast on the network during prime-time hours;

(b) compelled outside program suppliers to grant to it financial interest in television programs produed by them;

(c) refused to offer program time to advertisers and other outside program suppliers;

(d) controlled the prices paid by NBC for the exhibition rights to motion picture feature films distributed by non-network distributors; and

(c) as a producer of programs itself, obtained a competitive advantage over other producers and distributors of television programs and motion picture feature films.

It is claimed the effects resulting from these acts are:

(a) ownership and control of television programs shown during prime evening hours on the television network are concentrated in NBC;

(b) competition in the production, distribution and sale of television programs has been unreasonably restrained;

(c) competition in the sale of television programs to NBC by outside program suppliers has been unreasonably restrained; and

(d) the viewing public has been deprived of the benefits of free and open competition in the broadcasting of television entertainment programs.

The complaint prays for the following relief:

(1) that NBC be prohibited from obtaining any interest except for the first-run right of exhibition in television programs produced by others;

(2) that NBC be prohibited from engaging in syndication of any television programs;

(3) that NBC be prohibited from transmitting over its television network any television program, including feature films, produced by NBC or any other commercial television network, and from allowing any NBC-produced program from being transmitted over CBS or ABC networks; and

(4) that NBC be prohibited from using its control of access to broadcasting time on the NBC network to foreclose competition or obtain an unfair competitive advantage in any other field.

In summary, the complaint focuses on three basic aspects of business within the NBC television network: (a) the terms and conditions on which NBC purchases television programs and feature length films from independent producers and suppliers; (b) the terms of access to the NBC television network; and (c) NBC's production of its own television programming and films.

III. Terms of the Consent Judgment

Discussion of the terms of the proposed judgment and the relief provided therein follows the organization of the judgment itself. The judgment addresses various practices of NBC, and review of the judgment by subject matter will facilitate later consideration of objections lodged against the judgment.

(a) *Financial Interests and Syndication*

Section IV of the proposed judgment prohibits NBC from acquiring syndication and other distribution or profit shares in television programs produced by others. Thus, in negotiating the purchase of television programs from independent producers and suppliers, NBC would be permitted to acquire only the right of first-run exhibition and certain rights incident to the licensing and use of programs. The network would be prohibited from acquiring "financial interests" in a television program produced by an out-

side source which would earn revenues and profits for NBC beyond the network run of the program. Syndication is the most significant of these secondary rights, and NBC would be prohibited from acquiring any domestic syndication rights. The judgment permits foreign syndication of NBC-produced programs and certain foreign programs.

The relief provided for in this section of the judgment parallels the restrictions placed on all three television networks by the FCC's financial interest and syndication rules.

(b) *Internal Production of Programs*

Section V of the judgment places restrictions on NBC's ability to exhibit on the NBC network television programs which it has produced. For a period of ten years, NBC is restrained from broadcasting on the NBC network more than two and one-half hours per week in prime-time hours, eight hours per week in daytime hours, and eleven hours per week in fringe-hours television programs which it has produced itself. Thus, for those hours set aside for non-NBC-produced programming, NBC would be required to obtain the programs from independent program suppliers. This provision does not take effect until similar relief is obtained against CBS and ABC in the ongoing litigation.

(c) *Terms and Conditions of Program Purchases*

A substantial portion of the programs exhibited on the NBC network are purchases from independent program suppliers. Section VI of the judgment imposes on NBC various restrictions on the terms and conditions it may seek in contracting with independent program suppliers for the purchase of television programming.

(d) *Subsidiary Rights*

NBC is prohibited from purchasing or offering to purchase exhibition rights to an independent program supplier's program on the condition that the supplier would grant NBC any right or interest other than those incident to network licensing and use of the program. This prohibition reinforces the restriction on NBC in acquiring syndication and other financial interest rights in a television program.

(e) *NBC Production Facilities*

For a period of fifteen years, NBC is prohibited from purchasing or offering to purchase from an independent program supplier the right of exhibition of a television program on the condition that such supplier produces the program, in whole or in part, by utilizing NBC's production facilities.

(f) *Facilities, Contracts*

For a period of fifteen years, NBC is prohibited from contracting with an independent program supplier for the use of NBC production facilities for a period in excess of the time required to produce episodes for one broadcast year, provided however that the parties at the end of each year may renew the contract for one additional year. This provision precludes NBC from requiring independent program producers to enter into long-term contracts for the use of NBC's production facilities. This provision will not take effect until similar relief is obtained against CBS and ABC.

(g) *Reciprocal Dealing*

To preclude NBC from avoiding the limitation on internal production, this section would prohibit NBC from engaging in reciprocal dealing with CBS or ABC, by prohibiting NBC from purchasing exhibition rights of any television programs produced by CBS or ABC on the condition that CBS or ABC purchase similar rights from NBC. This restriction applies for a period of ten years.

(h) *Exclusive Rights*

This provision of the judgment imposes ceilings on certain exclusive rights that NBC may acquire from independent program suppliers in connection with the purchase of exhibition rights for a television program.

(i) *Options*

This provision is designed to restrict NBC's ability to obtain exclusive rights to a program series developed and produced by an independent supplier for as long as seven years. Since in most cases contracts between NBC and independent suppliers for the production and television exhibition of programs are entered into before the program has been developed, under its present practice NBC can obtain exclusive exhibition rights to a program series for up to seven years at a point when the independent producer can merely speculate as to the program's popularity and value. This provision prohibits NBC fro[illegible]cluding in its contracts with producers exclusive yearly options for more than four years, plus a single year's extension if the contract is renegotiated. If NBC wished to extend its exclusive network exhibition right beyond this initial five-year period, it would have to negotiate a new contract at or near the end

of the first contract. With respect to acquiring first negotiation or first refusal rights for new agreements with the supplier, the permissible first refusal rights which NBC could acquire may not prohibit the program supplier from entering into a new contract at the end of any contract term with someone else if the terms were equal to or better than the supplier's last offer to NBC. This provision takes effect only if similar relief is obtained against CBS and ABC.

(j) *Exclusive Exhibition Rights*

This provision places limits on the exclusive exhibition rights NBC may acquire from independent program suppliers. First, with respect to prime-time use of a program, NBC may not acquire an exclusive right of exhibition beyond the term of the contract by which NBC acquired the right to network exhibition. Second, NBC may not obtain more than four years of exclusivity as against non-prime-time stripping. "Stripping" is the broadcast of a program series more than once a week after the series has been exhibited on the network. The judgment provides, however, that if NBC has agreed to order episodes of a program for the first year of broadcast as an NBC prime-time program series, it may negotiate for and acquire rights for stripping and once-weekly exhibition to be utilized after the above periods of exclusivity. Third, for all other broadcast use of a program, NBC may not acquire the right of exclusive exhibition for more than three years. NBC remains free to acquire exclusive exhibition rights to a series for the broadcast year for which such series is ordered.

(k) *Exclusivity in Feature Films*

This section limits the exclusivity rights NBC may acquire in theatrical feature films. It bars altogether the

acquisition of exclusive exhibition rights as against the exhibition of feature films by theatrical and non-theatrical direct projection, on closed circuit television in non-residential hotels, motels, bars, restaurants, and hospitals, or on passenger-carrying vehicles. Additionally, NBC is barred from acquiring exclusive exhibition rights as against use of feature films in discs, cartridges or cassettes.

The original proposed judgment filed with the Court in November of 1976 contained a provision restricting the exclusive rights NBC may acquire to pay cable television. The provision would have limited NBC to exclusivity for a period of 24 months for two runs of a feature film and an additional 12 months for each subsequent run. In recognition of public comments critical of this provision as an establishment of an industry standard which is anticompetitive, the parties determined to, and did, delete this provision in its entirety. Thus, the amended judgment contains no provision on exclusivity in pay cable television. *See infra.*

(l) *Options on Pilots*

This provision places restrictions on NBC's ability to obtain a first-year pick-up option from an independent program supplier for a program designated by NBC and the supplier as a "pilot program." If NBC has not advanced the supplier any part of the cost of the pilot development, it is prohibited from acquiring a pick-up option exercisable more than one year after delivery to NBC of the pilot. The provision places a further limitation on the exercise of these options. Program selections for each network's new fall season are generally made in the preceding spring, and for the so-called second season replacement, selections are made in the preceding fall. In an attempt to make available those series that have not been selected by NBC for tele-

vision exhibition, the judgment requires NBC to release its options to 65 percent of such pilots upon the payment to NBC of all its unrecouped costs for the development of such pilots. This provision therefore makes it possible for independent suppliers who have sold pilots to NBC subject to an exclusive one-year option to be relieved of that option so that, upon the pilot being rejected by NBC, the supplier may offer it to other networks or television stations. This provision would not take effect until similar relief is obtained against CBS and ABC.

(m) *Exclusive Rights to Spinoffs*

It is not uncommon for one television series to generate other television programs based on characters of the first; these evolved series are referred to as "spinoffs." This provision of the judgment restricts the rights NBC may acquire in spinoffs. Where the spinoff involves a non-continuing character—that is, a character who appears in no more than 25 percent of the original episodes during the 12 months prior to the time the independent supplier offers exhibition rights for the spinoff—NBC is prohibited from obtaining a contractual option in excess of first negotiation and a limited first refusal right. The first refusal rights permitted cannot prohibit the program supplier from entering into a new contract for the exhibition of the spinoff with someone else if the terms are equal to or better than the supplier's last offer to NBC. This provision would not take effect until similar relief is obtained against CBS and ABC.

(n) *Use of Repeats*

In addition to the right of exhibition, a television program series also involves repeat rights, by which the net-

work may exhibit the program again after the original showing. This provision limits NBC's use of repeats acquired as part of network exhibition to the same year as that in which the initial expisodes of the series are broadcast. There are three express exceptions to this prohibition: (1) as to three episodes of each series per year, NBC may rerun them in any subsequent year; (2) once NBC has ordered program series episodes for the first year of broadcast, it may purchase rights to additional repeats for subsequent years without limitation; and thus the general prohibition would be totally voided once NBC has agreed to order episodes of the program series for the first year of broadcast on the NBC network; (3) the limitation on the use of repeats does not apply to (i) made-for-television and theatrical feature films, (ii) specials, and (iii) cartoons or other children's programs. This provision would not take effect until similar relief is obtained against CBS and ABC.

The remaining sections of the judgment concern miscellaneous matters. Section VIII sets forth certain areas of NBC activity which are not disturbed by the judgment. Section IX provides that if a non-appealable judgment is entered dismissing the actions against either CBS or ABC or decreeing injunctive relief different from that provided in this judgment, NBC may seek and obtain whatever relief is necessary to prevent it from being placed at a competitive disadvantage with respect to CBS or ABC. The government acknowledges that a provision of this type is unusual in an antitrust judgment, but justifies it on the ground of the unique nature of the television industry. Finally, Section X of the judgment requires NBC to furnish copies of the judgment to all its officers, directors, and appropriate employees and agents, and for ten years to furnish copies to each independent program supplier known to have offered programs to NBC within the preceding five years.

IV. Objections to the Consent Judgment

After the original proposed judgment was published in the Federal Register in November of 1976, the government and the Court received numerous comments from interested parties discussing the merits of the proposed judgment. Pursuant to the terms of the APPA, a period of at least ninety days was left open for the submission of public comments. The vast majority of the comments received were in opposition to some or all of the terms of the judgment. This fact probably carries no independent significance since few interested parties would take the time and amass the resources necessary to file favorable comments. The negative comments, however, did direct the Court's attention to possible shortcomings in the proposed judgment, and for that reason were given serious consideration before final approval was given. The interested parties submitting comments on the proposed judgment fall into four general categories: (1) independent program suppliers; (2) CBS and ABC; (3) public interest groups; and (4) members of the pay cable television industry.

A. *Objections of Independent Program Suppliers*

The following independent television producers and suppliers submitted comments in opposition to the proposed judgment: United Artists Corporation, Metro-Goldwyn-Mayer, Inc., Columbia Pictures Industry, [sic] Inc., Goodson-Todman Productions, Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation, Warner Brothers, Inc., Universal City Studios, Inc., Tandem Production, Inc., Enterprises, Inc., Lorimar Productions, Inc., and the Caucus of Producers, Writers and Directors, T.A.T. Communications Company, Bud Yorkin Production, MTM Enterprises, MTM Productions, Inc., and Charles Fries Productions, Inc.

The consensual position taken by the independent program producers and suppliers (hereinafter "independent suppliers") is that the proposed judgment does not go far enough in curtailing and restricting the alleged anticompetitive practices of NBC. The independent suppliers, of course, are the persons and organizations which contract with NBC for the purchase and sale of television programming and as purchasers are interested in obtaining the most favorable terms possible. As the original holders of many of the rights brought into issue by the judgment, these parties have a substantial and obvious financial interest in reduction of the negotiating power of NBC.

The general position taken by the independent suppliers is that the proposed judgment does not require NBC to change in any significant part any of the anticompetitive practices that have placed independent suppliers at a distinct disadvantage. These parties contend that the proposed judgment provides no meaningful relief from the alleged antitrust violations outlined in the government's complaint and urge the Court to decline to give its approval to the judgment.

The following are the specific objections the independent suppliers lodge against the terms of the proposed judgment:

1. *NBC Internal Production*

The independent suppliers object to any internal production of television programming by NBC and object that the limitations placed on NBC's ability to produce programs exhibited on the NBC network is insignificant. It is an uncontested fact that in this respect pursuant to the terms of the judgment NBC will be entitled to more hours of prime-time internally-produced television programming

than NBC is in fact presently generating. It appears that now the only prime-time series owned by NBC consumes one hour of time per week. Under the judgment, NBC will be permitted to expand its internal production up to two and a half hours of prime-time viewing per week. The independent suppliers claim that NBC may threaten expansion of internal production in order to obtain more favorable terms in the purchase of programs from the independent suppliers. In response, the government argues that a ceiling on NBC's internal production will prevent it from substantially increasing its internal production and thereby excluding independent program suppliers; the result, in the government's mind, is increased competition in the television program production market.

The major film studios also argue that within the limitation of two and a half hours of prime-time per week, NBC is free to produce internally feature length motion pictures for television exhibition, thereby depreciating the market for films produced by the major studios. The major studios argue that unless NBC's ability to make feature films is restricted, it will continue to use the threat of internal production to keep the price it pays outside feature film suppliers at an artificially low level. These parties, therefore, urge a total ban on NBC internal production.

The position of the independent suppliers is fairly clear —if NBC is removed entirely from the market of television program production, there should be a greater demand for programming supplied by the independent producers and correspondingly less leverage on the part of NBC to extract favorable terms.

The Court has considered whether the presence of NBC as a producer of prime-time television programming will enhance or restrict competition in the television programming production market. The judgment permits limited

participation by NBC despite the independent program suppliers contention that NBC should be excluded altogether as a producer of television programming.

2. *Options*

The terms of the judgment concerning the permissible options NBC may acquire to a program series is a major source of opposition by the independent suppliers. When a network orders a "pilot," it obtains an option for other episodes for the first year of telecast, plus options to order episodes for succeeding years. These options may be purchased when the "pilot" is only in development and thus the price for the option years are established without any true indication of the program's eventual popularity or worth. The judgment limits NBC's acquisition of options to four years, with the right to obtain one additional year if the agreement with the independent supplier is renegotiated.

The independent suppliers complain that this provision does not go far enough in curtailing NBC's use of its negotiating power to extract long term options from the producers. Once again, the issue is whether the relief provided by the judgment [Section VI(E) (i)] is "substantial," as maintained by the government, or merely cosmetic, as maintained by the independent suppliers. The government originally sought a two-year limit on the options which NBC could acquire, but concedes that it was forced to compromise and accept a longer period. One factual dispute arising from these conflicting positions concerns NBC's practice in acquiring options. The government contends that the networks presently obtain initial program options of six or seven years; it consequently characterizes a limitation of four years as "substantial" relief. The independent suppliers, on the other hand, contend that the present industry practice is to obtain options for five years only, and therefore argue that a limitation of four years is not at all substantial. The suppliers also complain that NBC's right to renegotiate for a fifth option year serves no purpose in promoting competition.

The judgment's limitation on options applies only to prime-time programming, prompting some independent suppliers to complain about the lack of any limitation on the option NBC may acquire as to non-prime-time programming. It is noted in this respect, however, that the government's inquiry into network practices originally focused only on prime-time programming.

3. *Exclusivity*

The independent suppliers complain that the various provisions of the judgment relating to the exclusive rights against other television uses which NBC may obtain provide no meaningful relief. The judgment permits NBC to acquire exclusive rights as against other prime-time use of a program series for the duration of the agreement between NBC and a program supplier. The independent suppliers complain that this provision precludes them from licensing older episodes for broadcast to independent stations in the early evening hours. Secondly, the judgment permits NBC to acquire at least four years of exclusivity as against non-prime-time stripping of a program series; the independent suppliers contend that since a producer must usually have at least four years of episodes of a program before stripping is possible, for all practical purposes, NBC will be able to acquire the same exclusive rights it presently acquires. Thirdly, the judgment permits NBC to obtain exclusive rights as against all other broadcast uses not in excess of

three years; the suppliers argue that in the absence of any proof that prime-time ratings of new episodes are adversely affected by showings of older episodes in non-prime-time hours, there is no justification for precluding a program supplier for three years from making whatever use he can during non-prime-time for older episodes of a program. Finally, the suppliers complain that the provision of the judgment that permits NBC to acquire greater exclusive rights than outlined in the judgment if it has agreed to purchase episodes of a program for the first year of broadcast serves no pro-competitive purpose and is without justification.

The limitations on the acquisition of exclusive rights imposed by the judgment is an attempt to even out the bargaining positions of NBC and its independent program suppliers. The government contends that the imposed limitations constitute substantial relief and will have a pro-competitive effect within the television programming market. On the other hand, the independent program suppliers maintain that the decree does not go far enough in restricting the rights which NBC may acquire and that in effect NBC has given up virtually nothing in agreeing to the proposed judgment.

4. *Parallelism*

Section VII of the judgment provides that certain key provisions will not take effect until similar relief is obtained against CBS and ABC. The independent suppliers argue that this provision guarantees that for the future the three networks will be able to offer suppliers of television programs virtually identical terms and conditions. The government's justification for this provision is that, in light of the unique nature of the television industry, NBC

should not be placed at a competitive disadvantage with respect to the other television networks by virtue of its agreement to this proposed judgment.

The gist of the independent suppliers' opposition in this regard is that there is no price competition among the three networks and that this decree fails to alleviate that condition. The government's response is that it recognizes that each network has enormous market power not subject to meaningful competition from the other networks or from non-network stations. Its purpose in bringing these actions was to limit each network's use of its power in purchasing television entertainment programs; it is readily apparent from the face of the complaint and the terms of the consent judgment that the government did not intend directly to foster competition between NBC and CBS or ABC. The proposed judgment must be viewed in light of the government's limited objectives. Apparently the government by the three pending lawsuits chose not to challenge therein the oligopolistic structure of the television industry, but rather, recognizing the immense market power of each network, sought merely to limit the exercise of that individual power and create a situation in which independent program suppliers would be able to obtain more favorable terms than was heretofore possible.

5. *Exclusive Use of Talent*

The government has discovered that a new and growing trend among the networks is to acquire exclusive contracts with talent performers, producers, directors and writers, or to acquire exclusive exhibition rights to literary properties, and then to "lay off" the talent or the property on an independent producer. To "lay off" a talent or property is to assign the contractual rights therefor to an independent program producer in connection with a pro-

gram production agreement. Once the program is produced, the talent or property reverts back to the network. In this way the network avoids labeling a program as an "in house" program, but still retains a large degree of control over it. If the network decides not to develop a series from a pilot or to cancel a program series that has been on the air, the independent producer is precluded from attempting to sell the program elsewhere since he cannot obtain either the talent or the literary property to make subsequent episodes of the program. The government also correctly notes that when a single network has an exclusive hold on talent or on a property, no other network can compete for the talent or property in question. Moreover, it seems that, all other things being equal, the network will attempt to fill its scarce air time first with talent and properties to which it holds exclusive contracts.

The independent suppliers oppose entry of the consent judgment on the ground, *inter alia*, that it does not provide any relief from NBC's practice of acquiring exclusive rights to talent or literary properties. The government's response to such an objection is as follows:

> "The government considered various ways of limiting NBC's use of these exclusive contracts in the proposed final judgment, but decided that a specific provision appeared unwarranted at this time. It was decided, therefore, that a satisfactory resolution of this problem was to agree with NBC that further relief under the judgment or by a new action could be sought, if it were later found that NBC had used exclusive contracts so as to impede competition."

By express stipulation, therefore, the parties have left open the question of future relief in regard to the network's practice of acquiring exclusive talent rights.

B. *Objections of CBS and ABC*

Both CBS and ABC have lodged multi-front attacks on the proposed judgment and strenuously urge the Court to withhold its approval. Their objections are summarized below.

1. *The Proposed Decree is Anticompetitive.*

CBS and ABC contend that rather than fostering competition in the television production market, the judgment will have a decidedly anticompetitive effect. They characterize the decree as one that will benefit a particular group of program producers by shielding them from the rigors of competition, but which makes the market in which such producers operate less competitive. In their view, the judgment protects competitors, not competition.

(a) *Limitation on NBC Production*

ABC and CBS argue that Section V of the judgment, which limits the amount of television programming that may be produced by NBC, will restrict the supply of television programs without altering the demand therefor. They contend that the effect, therefore, will be to drive up the price of television programming. Moreover, the networks argue that with one less producer in the market of programming production, competition among the independent producers will be relaxed. Notwithstanding the limited amount of internal production presently engaged in by NBC, ABC and CBS characterize their fellow network as a source of potential competition which serves as a substantial incentive to competition by others operating in the market. ABC and CBS further note that a production limitation is particularly inappropriate in light of the shortage

of theatrical feature films for television. If the shortage worsens as a result of the judgment, the networks claim that the only foreseeable result will be yet higher prices charged by the major film studios for feature films.

(b) *Restrictions on Terms of Trade*

ABC and CBS complain that those provisions of the judgment which restrict the rights NBC may acquire from program producers are anticompetitive and will serve to reduce competition among television program producers and suppliers. Their rationale, supported by affidavits of an economist and a professor of law, is that restrictions on the rights NBC may acquire in addition to the right of exhibition will force independent producers to bear more of the risk of a program's failure. For example, the networks refer to the restriction on the renewal options which NBC can purchase, arguing that the restriction prevents producers from selling "up front" to NBC options for later years of a program, thereby preventing them from realizing at an early date the current value of those options. CBS and ABC further argue that by shifting the risk of failure, the proposed judgment will force out small independent producers and suppliers, who are not in a position to absorb their costs of production without realizing quickly the full exploitation value of the program series.

CBS and ABC correctly recognize that the judgment is not intended to enhance competition among the three television neworks. They view the judgment as establishing a complex system of regulation over the contractual relationships between the networks and independent program suppliers designed to afford the suppliers a fair price. To their mind, however, this is not the purpose of the Sherman Act, which is intended to protect competition rather than

competitors, and should not be condoned by the Court. The government's response is that contrary to the assertions of the other networks, the judgment will enhance competition in the market of television program production by reducing the market power of NBC so that it is not as free to dictate the terms and conditions upon which it acquires rights in television programs.

2. *The Proposed Judgment Establishes a Regulatory Regime that Conflicts with the Regulatory Authority of the FCC.*

The FCC has promulgated rules and regulations bearing upon certain matters that are the subject of this judgment. The Court has long recognized that there may be "a real and substantial problem" of accommodating antitrust relief with the FCC's regulatory scheme. It is no surprise that ABC and CBS now, again, argue that the relief provided by the judgment duplicates, overlaps and collides with the FCC's regulatory regime.

First, ABC and CBS argue that this Court will be placed in the position of overseeing a complex regulatory scheme resulting from the terms of the judgment. Of course, there is a duty upon a Court, once it has approved a consent judgment providing for injunctive relief, to oversee effectuation thereof. This is an unavoidable duty for courts handling large antitrust cases. While the degree of supervision required of a judgment is a significant factor to be considered, it alone should not bar relief where it is otherwise indicated.

In January of 1977 the FCC issued a notice of inquiry into the television industry, initiating proceedings in which many, if not all, of the matters here under consideration would be investigated. CBS and NBC contend that the regulatory scheme created by the judgment may conflict

with the results of that inquiry. Since the FCC inquiry has only recently begun, and as of this date has not resulted in any rules or regulations, one may only speculate as to the possibility of conflict between the terms of this judgment and any rules that may materialize from the FCC's investigation. The overlap and possible conflict between the relief provided by the judgment and the regulatory scheme that may result from the FCC's inquiry is one of the most serious issues attending the Court's consideration of the consent decree. Therefore, the exact scope of the FCC's investigation must be considered by the Court.

All parties agree that the FCC's recently initiated inquiry into television programming practices covers almost every issue brought into question by the judgment. While it is not certain that the FCC investigation will result in definite rules and regulations, there indeed is a substantial likelihood that the Commission will engage in further rule making once its investigation is completed. This Court previously has held that exclusive jurisdiction over the subject matter of the antitrust actions filed against the neworks does not lie within the exclusive or primary jurisdiction of the FCC; there is, therefore, no legal impediment to this Court's decreeing appropriate antitrust relief. With respect to the issue of reconciliation of antitrust relief with the FCC's regulatory scheme, assuming this judgment is implemented prior to the conclusion of the FCC's investigation, the burden would fall on the Commission to formulate regulations not in conflict with outstanding judicial orders. While the Court is cognizant of the FCC investigation, and may even wish to take advantage of the expertise lent to that investigation by the FCC, the Court should not be deterred from ordering appropriate antitrust relief by the fact of the Commission's inquiry.

3. *The Proposed Judgment Undermines NBC's First Amendment Rights.*

ABC and CBS assert, presumably on behalf of NBC, the position that the judgment undermines First Amendment values in restricting NBC from engaging in internal production programming. Aside from the fact that CBS and ABC have no standing to assert constitutional rights of NBC, it may be observed that the judgment restricts NBC's participation in a commercial venture and in no way attempts to dictate the content of programs which may be exhibited on the NBC network. It is clear that the First Amendment does not shield NBC nor any other television network from the proscriptions of the Sherman Act.

C. Opposition of Pay Cable Television Industry

The original proposed judgment submitted to the Court in November, 1976 contained a provision regarding the exclusive exhibition rights of feature length films which NBC may acquire as against pay cable television. Following the receipt and consideration of numerous comments from interested parties, the vast majority of which were in opposition to the pay cable provision, the government and NBC decided to delete from the judgment any relief whatsoever concerning exclusive rights as against pay cable television. Thus, the judgment does not address the issue of exclusivity as against pay cable television.

The original pay cable provision provided that NBC may acquire exclusive rights to the exhibition of a feature film as against pay cable television use of such film for a maximum period of 24 months for two showings, and an additional 12 months for each showing in addition to the two original showings. The public comment on this provi-

sion, submitted primarily by members of the pay cable television industry, argued that this provision would set an industry-wide standard and confer government blessing on a blatantly anticompetitive practice. While the government's original intention in proposing the pay cable limitation was to establish a ceiling on permissible exclusive rights, upon the review of the public comments, it appeared to the government that the actual effect of the provision would be to establish a controlling standard in the television industry. Consequently, the pay cable provision was deleted from the judgment.

Notwithstanding the deletion of the provision, the pay cable parties maintain that the decree should not be approved by the Court so long as it omits to provide substantial relief against NBC's practice of obtaining exclusive rights as against pay cable television stations. The pay cable parties thus urge the government to pursue affirmative relief in the form of severe or total restrictions on NBC's power to acquire exclusive rights as against the pay cable industry. The government has not officially responded to this position. After amending the judgment so as to delete the objectionable pay cable provision, the government did not issue a new competitive impact statement discussing the ramifications of the deletion of the pay cable provision. It is contended by some parties that a new competitive impact statement is required under the APPA and that the decree cannot be given final approval until an amended competitive impact statement is submitted by the government. The APPA does not expressly require the submission of multiple competitive impact statements, and the contention of the pay cable parties raises a question of first impression. While republication and initiation of a new period of receiving public comments apparently is not required

by the APPA, arguably it is in keeping in spirit with the ACT to require the government to respond to the position of the pay cable parties that entry of the judgment by the Court is not in the public interest in the absence of affirmative relief with respect to exclusivity and pay cable television.

A well-recognized principle of law bearing on the issue raised by the position of the pay cable parties is that the government need not in a single action rectify all injustices uncovered by its investigation and discovery. With respect to the pay cable industry, it appears that, upon determining that it could not arrive upon a stipulated agreement providing for substantial relief, the government chose to defer to a later time actions which could result in the type of corrective action advocated by the pay cable parties. The issue for the Court's determination is whether, in the absence of any restriction on the right of NBC to acquire exclusive rights as against pay cable television, the judgment, which otherwise may be justified, fails to satisfy the public interest.

D. *Objections of Public Interest Groups*

The only so-called public interest group to file comments with respect to the judgment was the Institute for Public Interest Representation of Georgetown University Law School. The gist of their comments is that the competitive impact statement ("CIS") submitted by the government in support of the judgment is insufficient as a matter of law in light of the requirements of the APPA. The same objection also has been raised by ABC and CBS. In the case of ABC and CBS, objections to the form and content of the CIS are in actuality objections to the form and content of the terms of the judgment. For example, CBS complains

that the CIS fails to explain how the judgment will enhance competition in the television program production market, whereas in fact the substance of CBS's objection is that in its view the judgment is anti- rather than procompetitive.

The Institute for Public Interest Representation cites various perceived shortcomings in the CIS but fails to make a conclusive showing that the statement fails to satisfy the specific requirements of the APPA. The government has responded to the Institute's comments and is prepared to defend the CIS as legally sufficient.

All of the foregoing issues and conflicting conditions relating thereto have been considered by the Court; each contention has been weighed on the scale of whether it tilts for or against "the public interest"; each has been considered in light of the special interest of the respective proponents thereof. None of the proponents strikes the Court as an advocate for "the public interest." Although each proponent has been of assistance to the Court in its consideration of "the public interest," none has offered a solution that meets "the public interest." The government in its role as protector of "the public interest" appears to have accomplished an acceptable result.

The government, having expressed its proper prosecutorial prerogative by the filing of the instant action (together with the actions against CBS and ABC), issue was long ago joined; all parties in each case proceeded with the utmost vigor to indulge the adversary process; and now the adversary parties (NBC and the government) have arrived at a compromise settlement of their litigated differences.

That the law looks with favor upon compromise settlements generally is indisputable; that it looks with par-

ticular favor upon such settlements as emerge from vigorous head-knocking on the part of capable and energetic adversaries whose prolonged stir and contest has occurred at arm's length is, if anything, even more obvious. Embodying this policy and directly applicable to Court approval of a consent decree in civil public antitrust suits is the oft-quoted dictum of the Supreme Court in *Sam Fox Publishing Co.* v. *U.S.*, 366 U.S. 683, 81 S.Ct. 1302 (1961). There, in denying intervention as of right during proceedings to modify a consent decree to members of a music association which had entered into such a decree, the Court observed:

> [S]ound policy would strongly lead us to decline appellants' invitation to assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the government in so acting.

Id. at 689, 81 S.Ct. at 1313. *See U.S. v. Armour & Co.*, 402 U.S. 673, 681-82, 91 S.Ct. 1752, 1757 (1971); *U.S.* v. *ITT Continental Baking Co.*, 420 U.S. 223, 236-37, 95 S.Ct. 926, 934 (1975).

This standard continues to apply with equal force even after enactment of the Antitrust Procedures and Penalties Act ("APPA"), Pub.L. 93-528, § 2, 88 Stat. 1076 (December 21, 1974), 15 U.S.C. § 16 (1977 Supp.), *U.S.* v. *Associated Milk Producers, Inc.*, 394 F.Supp. 29, 41 (W.D.Mo. 1975), *aff'd*, 534 F.2d 113, 117 (8th Cir. 1976). The district court in *AMPI*, after noting that pre-APPA criticism of the consent decree procedures focused on the failure of the Justice Department and the courts to give substantial consideration

to the views of third parties, the secrecy of the negotiation process itself, and the minimal judicial scrutiny of the proposed decree, 394 F.Supp. at 42, quoting Note, "The *ITT* Dividend: Reform of Department of Justice Consent Decree Procedures," 73 Col.L.Rev. 594, 597 (1973), observed:

> Courts, of course, cannot do anything about "the secrecy of the negotiation process itself." Indeed, a court's power to do very much about the terms of a particular decree, even after it has given the decree maximum, rather than minimum, judicial scrutiny, is a decidedly limited power. *See United States* v. *Ward Baking Co.*, 376 U.S. 327, 84 S.Ct. 763, 11 L.Ed.2d 743 (1963); [*City of Burbank* v. *Gen. Electric Co.*, 329 F.2d 825, 831 (9th Cir. 1964).] Power to reform the procedures under which consent decrees are actually negotiated is vested in the executive and legislative branches, not the judicial. And, *if the Congress wants the judicial branch to have more power than that implicit in a threat of total rejection of a proposed decree, such power must be authorized by legislation which is considerably broader in scope than that vested by the newly enacted Antitrust Procedures and Penalties Act or by existing law.*
>
> Courts have long had power, however, . . . to devise and direct appropriate procedures to enable the Department of Justice and the court to have the benefit of the views of third parties. Courts which accept Brandeis' idea that "[s]unlight is said to be the best of disinfectants," L. Brandeis, *Other People's Money*, 92 (1914 ed.), have exercised that power under the circumstances of a particular case. That objective may be effectively attained by procedures which do not include the complications which may

> result from the granting of a formal motion to intervene as a party.

Id. at 42-43. [Emphasis supplied.] Adverting specifically to the impact of APPA on the procedures designed to meet these objectives, the Court noted:

> We agree, of course, with the statement in the Note [73 Col.L.Rev. 594] that "Most of the procedural devices contained in the Tunney bill have long been available to the courts to investigate decrees" and that "*the specific guidelines for judicial investigation* [now incorporated in the Antitrust Procedures and Penalties Act], all discretionary with the court, *are hardly revolutionary.*"

Id. at 42 n.11 [Emphasis supplied.] On Appeal the Eighth Circuit, addressing its remarks to an issue analogous to that which this Court has been directing its energies, held that:

> It is axiomatic that the Attorney General must retain considerable discretion in controlling government litigation and in determining what is in the public interest. Thus, in our view, the intervention standard remains that which was stated in *Sam Fox*: "[B]ad faith or malfeasance on the part of the Government" in negotiating and accepting a consent decree must be shown before intervention will be allowed. 366 U.S. at 689, 81 S.Ct. at 1313, 6 L.Ed.2d at 609.

534 F.2d at 117.

One of the most thoughtful and thorough treatments to thus far emerge in the post-APPA era with regard to the proper posture and approach of a court faced with approval

of a consent decree was offered by Senior Circuit Judge Aldrich in *U.S.* v. *Gillette Co.*, 406 F.Supp. 713 (D.Mass. 1975):

> Taken literally, the burden [that APPA places upon a court reviewing a proposed consent decree] is impossible. The legislative history shows clearly that Congress did not intend the court's action to be merely pro forma, or to be limited to what appears on the surface. Nor can one overlook the circumstances under which the act was passed, indicating Congress' desire to impose a check not only on the government's expertise—or at the least, its exercise of it—but even on its good faith. *See* 120 Cong. Rec. S 20862 (daily ed. Dec. 9, 1974); BNA Antitrust & Trade Reg. Report No. 630, at A-15 (1973). At the same time, both by the statute's listing various alternatives short of a comprehensive examination, 15 U.S.C. § 16(f), and by the announced expectancy of both congressional committees, the court is adjured to adopt "the least complicated and least time-consuming means possible." *See* S.Rep.No. 93-298, 93d Cong., 1st Sess. 6 (1973); H.Rep.No. 93-1463, 93d Cong. 2d Sess. 8 (1974), 1974 U.S. Code Cong. & Admin. News 6539. *In this situation the court cannot provide the best of all possible worlds. Just as the parties are compromising, so in its process of weighing the public interest, must the court.*
>
> This seems neither improper nor unwise. Fear has been expressed that the act's "elaborate procedure . . . will prove counterproductive and may, indeed, undermine [by placing too great obstacles on the consent process] effective enforcement of our antitrust laws." Handler, Antitrust—Myth & Reality in an Inflationary Era, 50 N.Y.U.L.Rev. 211, 243 (1975). Courts' involvement in preventing potential harm to competition can become excessive. *Cf. Emhart Corp.* v. *USM Corp.*, 1 Cir. 1975, 527 F.2d 177. I agree that *in terms of the important role of the consent decree in antitrust procedure, too much tillage can destroy the garden.*
>
> Nor do I think Congress had, in fact, any contrary intention. The Senate Judiciary Committee reported that a high percentage of government antitrust actions are settled prior to trial, and recognized that the consent decree process was a "legitimate and integral part of antitrust enforcement." S.Rep., ante, at 3, 5. "Obviously, the consent decree is of crucial importance as an enforcement tool, since it permits the allocation of resources elsewhere." S.Rep. at 5. "[T]he Committee wishes to retain the consent judgment as a substantial antitrust enforcement tool." S.Rep. at 7. "The court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong.Rec. 24598 (1973).

Id. at 715. [Emphasis supplied.]

Turning to the precise standard by which a Court is to determine whether or not a particular consent decree is in "the public interest," a matter concerning which the Act, 15 U.S.C. § 16(e), provides no apparent guidance and for which there is a paucity of clarificatory case law, Judge Aldrich concluded:

> It is not the court's duty to determine whether this is the best possible settlement that could have

> been obtained if, say, the government had bargained a little harder. The court is not settling the case. It is determining whether the settlement achieved is within the reaches of public interest. *Basically I must look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass.*

Id. at 716. [Emphasis supplied.]

Having adhered to Judge Aldrich's sound advice, and having found that the proposed consent decree is in the public interest, the Court notes certain aspects that this case shares with *AMPI* and *Gillette*, the two most significant and searching decisions interpreting APPA.

First, as in *AMPI*, all interested persons have been afforded every right and opportunity fully and fairly to state their views and comments that formal intervention would have granted, and consequently, as did the court in *AMPI*, 394 F. Supp. at 44, this Court has denied motions to intervene. Second, as in *AMPI*, this Court is "satisfied that [it has had] much more data before [it] for consideration than that contemplated by [APPA], 394 F. Supp. at 35, and consequently that, heeding Judge Aldrich's comment respecting Congress' intent that courts adopt "the least complicated and least time-consuming means possible," 406 F. Supp. at 715, "a plenary evidentiary hearing [pursuant to 15 U.S.C. § 16(f)(1) and (3)] is neither necessary nor appropriate under the circumstances." 394 F. Supp. at 35. The legislative history clearly and expressly establishes that "[i]t [was] not the intent of the committee to compel a hearing or trial on the public interest issue." S. Rep. No. 93-298, quoted with approval in H. Rep. No. 93-1463 (1974 U.S. Code Cong. & Admin. News at 6538-39),

quoted in 394 F. Supp. at 45. Third, as in *AMPI*, this has not been a case "where the government has requested broad relief at the outset, represented to the courts that nothing less would do, and then abruptly 'knuckled under'...", 534 F. 2d at 118. In *AMPI*, as in *NBC*, "it was merely certain practices, and not the concert of action *per se* which the government sought to end," *id.*; and in evaluating a proposed consent decree, one highly significant factor is the degree to which the proposed decree advances and is consistent with the government's original prayer for relief, *see U.S.* v. *Automobile Mfrs. Ass'n*, 307 F. Supp. 617, 621 (C.D. Cal. 1969), *aff'd per curiam sub. nom. City of New York* v. U.S., 397 U.S. 248, 90 S.Ct. 405 (1970).

Finally, the Court derives additional confidence from the fact that this is not a case wherein objectors speak with one voice. In the deluge of comments which the proposed decree has prompted, the Court has found that while some commentators (e.g., independent program producers and suppliers) have objected generally on the grounds that the proposed decree does not go far enough in eliminating the anticompetitive practices of which the government complains, *see supra* at 16-23, others (e.g., the other networks) have urged upon the Court the position that the proposed decree, far from ameliorating the allegedly anticompetitive practices asserted by the government to exist in prime-time broadcasting, would in fact exacerbate the situation and actually restrain otherwise healthy competition, *see supra* at 23-26. In this regard, this Court thus is not faced with the unified opposition to entry of the consent decree with which Judge Aldrich was confronted in *Gillette*, and which prompted him to remark that the court need not "require that defendant do everything that opposers may wish. [Defendant] could always do something more. A point,

however, comes where an agreement ceases to be a compromise." 406 F.Supp. at 716.

From the outset of this action, as in the predecessor actions, this defendant and the other network defendants in the companion cases, sought to persuade the Court to dismiss, abstain or otherwise disregard the lawsuits. On three or more separate occasions, the Court was fairly inundated by defendants with briefs, memoranda, and other legal documents urging upon the Court that it was either without jurisdiction to determine, or should leave to another body to determine, or, before deciding, should await the advisory benefits of another body's determination. In each instance the Court was strongly impressed with the desirability of leaving for resolution the complex and technical issues here involved to an administrative body specially equipped, trained, and oriented in the field of communications, particularly with respect to "prime-time" programming in television. If it had been properly within the province of this Court to determine what the law ought to be rather than to accept what it is, this case and others would have been dismissed or deferred temporarily or indefinitely.

The entities objecting to the consent judgment on a jurisdictional basis, primary or otherwise, misconceive the function of this forum. The law is clear that the government is at liberty to pursue its remedy here in an action sounding in the federal antitrust laws even though the ills they attack are, or likely are, remediable by the administrative action of the Federal Communications Commission. *See United States* v. *Radio Corporation of America*, 358 U.S. 334, 49 S.Ct. 457 (1959). The later case of *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 95 S.Ct. 2427 (1975) offered some hope to those

who favored the theory of predominance or exclusivity of jurisdiction within the administrative body having regulatory power over the alleged Sherman Act violations. But that later decision leaves the network defendants with hope for the future but no solace here. The case is distinguished from ours; in *National Association of Securities Dealers*, the Supreme Court found the *express* authorization under the Investment Company Act (15 U.S.C. § 80-1 et seq.) of the activities challenged as violative of the antitrust law. The Court found the express authorization "repugnant" to the antitrust laws and hence expressly authorized acts were deemed immune from antitrust attack. This is not our situation. Ours is at most a situation in which the government is free to invoke either or both the administrative or judicial forum jurisdiction for correction of evils condemned under the Communications Act and the antitrust laws. *RCA* makes it clear that the Communications Act does not inhibit enforcement by the government of antitrust laws in broadcasting matters merely because the FCC acted in regard to the challenged conduct.

In our case the FCC has not acted; it has asserted merely its intention to act. But that has been going on for years with no results. It was this Court's view from the outset that the government could have, and perhaps preferably should have, bestirred the FCC to action rather than institute the current antitrust actions against the networks. However, it is outside the province of this Court to dictate to the government a prosecutorial course of conduct. It is the Court's province merely to determine if the course adopted by the government is permissible in law. It is; *see American Telephone and Telegraph Co.* v. *U.S.*, 427 F.Supp.

57 (D.D.C. 1976), petition for writ of certiorari denied and portion of Feb. 3, 1977 order staying further proceedings in district court vacated (Per curiam order in No. 77-1009, D.C.Cir., May 26, 1977), *cert. denied*, 46 U.S.L.W. 3352 (U.S. Nov. 29, 1977).

The relief provided by the judgment is consistent with the government's general theory of liability as manifested in its complaint. The actions against the three television networks never were instituted for the purpose of breaking up their oligopolistic control of the television industry or for the purpose of fostering competition among the three of them. The government's case has been predicated on the recognition that each of the networks possesses enormous market power, and that this power is being used to place independent program producers and suppliers, those who sell television programming to NBC, at a distinct competitive disadvantage. From the outset the government has sought to improve the lot of the independent producers and suppliers and enhance competition in the buying and selling of television programming by imposing on the networks restrictions on the terms and conditions governing their contracts with the independent suppliers. Thus, the government has recognized that because of the enormous market power possessed by NBC, it has been able to deal with the independent suppliers on terms highly favorable to the network and highly unfavorable to the suppliers. The remedy the proposed judgment seeks to accomplish is to limit the benefits and financial rewards that otherwise would flow from an exercise of this power. Accordingly, the Court has found that the consent judgment, on balance, advances and is in "the public interest," and so concluding, has approved said judgment.

The Clerk will send, by United States mail, to counsel for the parties a copy of this Memorandum of Decision.
DATED: January 26, 1978.

/s/ ROBERT J. KELLEHER
Robert J. Kelleher
United States District Judge

ENTERED
Jan 27 1978
Clerk, U.S. District Court
Central District of California
By Deputy

FILED
Jan 26 1979
Clerk, U.S. District Court
Central District of California
By Deputy

(SEAL)

Served on us by mail
Postmarked Jan 27 1979

Affidavit of Franklin M. Fisher

AFFIDAVIT OF FRANKLIN M. FISHER

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

FRANKLIN M. FISHER, being duly sworn, deposes and says:

I am a Professor of Economics at the Massachusetts Institute of Technology. My curriculum vitae, including a list of the books and articles I have written, is set forth in Exhibit 1.

I have been asked by counsel for CBS Inc. to analyze the probable economic impact of the proposed consent decree submitted to the Court in *United States* v. *National Broadcasting Company, Inc.* on November 17, 1976. I have also been asked to assess the Competitive Impact Statement ("CIS") filed by the Government with the proposed decree. In carrying out that analysis and assessment, I have taken into consideration numerous studies, articles, reports and other materials relating to the production, procurement and distribution of television entertainment programming, including reports of the Federal Communications Commission ("FCC"), industry and trade publications, interviews with executives in the broadcasting, program production and advertising industries, testimony of program suppliers and others engaged in those industries, and the pleadings, affidavits and other materials filed in *United States* v. *NBC* and the companion actions against ABC and CBS.

I have reached the conclusion that the proposed decree would tend to diminish competition. I have also concluded that the CIS fails to describe the competitive impact of the proposed decree.

Affidavit of Franklin M. Fisher

INTRODUCTION

As in any market, there are two aspects of competition to consider: competition among sellers and competition among buyers. If NBC has any power in the market for television entertainment programs purchased by networks, it is surely power that it has as a *buyer.*[1] Indeed, it is that power which is stressed by both the Complaint (¶¶ 7, 10) and the CIS (at 3, 4-5). NBC is indisputably a major buyer. It acquires rights to approximately one-third of the entertainment programs carried by the three television networks and, obviously, rights to all of the programs carried by NBC.

On the other hand, NBC's share of any market as a *producer* of such programs is quite small and has steadily declined over the past twenty years. In 1974-75 NBC-produced programs amounted to approximately 4.2% of the prime time entertainment programs carried by NBC and approximately 1.4% of the total carried by all three networks.[2] With either of those market shares, it is im-

[1] For purposes of this affidavit I shall generally assume that the market definition of the Government complaint makes sense and that it is appropriate to define the relevant market as consisting of "the trade and commerce in television entertainment programs exhibited on the NBC Television Network during prime evening hours" (Complaint ¶¶ 16, 17).

It should be noted, however, that such a narrowly drawn market—excluding as it does programs sold to ABC and CBS—makes no sense whatever for purposes of economic analysis since it is clear that ABC, CBS and NBC are in competition with each other not only for audiences and advertising revenues, but also for programs which attract audiences and thus earn advertising revenues. Indeed, the decree (Paragraphs VII and IX) and the CIS (at 14) proceed on the supposition that NBC is in competition with ABC and CBS and should not be "placed at a competitive disadvantage with respect to CBS or ABC".

[2] *See* Affidavit of J. Marshall Wellborn, sworn to November 25, 1975, submitted in support of NBC's Motion for Summary Judgment on the Sherman Act Claims.

possible to believe that NBC has monopolized or poses a credible threat of monopolizing the *production* of television entertainment programs. Indeed, if the Government is correct in asserting that NBC as a *buyer* of programming has been able to drive suppliers to the wall and leave them "hanging on by a slender thread"[3] in other words, if NBC can drive the price it pays down to the barest minimum needed to keep suppliers in business—it is hard to see how NBC could obtain any additional advantage by monopolizing the *production* of programming for NBC. That is, if, as the Government asserts, NBC can force "deficit financing" on its suppliers, there cannot be any advantage to NBC in making those deficits its own. Nor is it credible that NBC would monopolize the production of television programs for NBC in order to be able to drive up the price it must pay as a buyer of television programming.

It must be recognized that, notwithstanding the allegation of the complaint that NBC has sought to suppress competition among the suppliers of television programming to NBC, it cannot possibly be in NBC's interest to suppress competition among its suppliers either by monopolizing the production of programming or by any other means. Doubtless NBC, like any other buyer, seeks to pay the lowest possible price to its suppliers; but, like any other buyer, NBC can achieve that end by stimulating competition among its suppliers and not by suppressing such competition.

[3] According to the Government, NBC has inflicted "undue hardship" on program suppliers by not giving them "payment commensurate with the success" of their programs. Memorandum of the United States in Opposition to Defendants' Motion for Summary Judgment on the Sherman Act Claims, dated January 19, 1976, at 10, 20.

Given NBC's insubstantial position as a *producer* of programming and its interest in maximizing competition among its sources of supply, and in light of the focus of the complaint and CIS, one would have expected the proposed consent decree to focus on NBC's alleged power as a *buyer*. Strangely, the proposed consent decree is not designed to augment the competitive constraints to which NBC is subject as a buyer; if, as the complaint alleges, NBC were a monopsonist (*i.e.*, a monopolist buyer) before the decree, it would be a monopsonist after the decree. Instead of dealing with NBC's alleged monopsony power, the decree seems calculated to diminish competition among program suppliers, as I show more fully below. Although such a restriction of competition among suppliers might tend ultimately to increase their bargaining power and thus might result in a transfer of income from NBC to certain of its suppliers, shifts of that sort do not increase competition at any level and do not serve the public interest in economic efficiency that a procompetitive policy is designed to foster.

To be sure, at one time or another restrictions on competition among suppliers have been fostered by a variety of Government programs including, for example, the National Industrial Recovery Act, the Agricultural Adjustment Act, and the National Labor Relations Act. But the Sherman Act is not of that sort. The policy of preserving and promoting competition as the governing mechanism of the market place simply cannot be served by suppressing competition among sellers to counterbalance a real or supposed absence of competition on the buying side. Stating the matter differently, the bargaining between buyer and seller, however intense, is not a species of competition.

To put it simply, one can either seek to stimulate competition among sellers (and thereby drive down price) or

one can seek to increase the remuneration that sellers receive (by driving up price), but one cannot increase sellers' remuneration by stimulating the competition among them. In so far as the Government's goal is to increase the remuneration of program suppliers, the decree may well achieve that goal, but it will do so only to the extent that it suppresses competition among them.

For the reasons set forth below, I believe that the decree would, in fact, tend to reduce competition among program suppliers. Inasmuch as the Government's complaint charges that NBC has, inexplicably, pursued the self-defeating course of restricting competition among its suppliers, it is particularly strange to submit a decree which would itself operate to restrict such competition.

1. *The Proposed Decree Would Restrict Supply.*

Paragraphs V(A) and (B) of the decree severely restrict the extent to which NBC may produce its own programs. This restriction reduces the number of sources of supply of programs competing to be purchased by television networks. If an existing independent supplier (such as MCA or Warner Bros.) or a potential supplier were so restricted, the adverse effect on competition would be perfectly obvious. But there is no practical difference between restricting NBC as a supplier and restricting any other supplier. NBC's ability to produce simply provides another source of supply to which it can turn, and it thereby contributes to competition among program suppliers by providing an incentive for them to sell to NBC at as low a price as possible lest NBC increase its internal production. The case would be precisely the same if there were a wholly new,

independent source of programming with NBC's production capacity. The existence of such a source would contribute to competition among existing program suppliers by providing an incentive for them to sell to NBC at as low a price as possible lest NBC expand its purchases from the new company. In either case, removal of such an incentive is anticompetitive. Furthermore, the elimination of NBC as a competitor cannot be viewed as forestalling predation since not only is NBC now producing a miniscule part of its own requirements but also, as I have indicated above (pp. 3-4), it is impossible to suppose that NBC would seek to drive its suppliers out of business in order to monopolize the business of producing for itself.

Restricting NBC's production not only restricts the supply of television programs carried by NBC but also restricts supply in the market for network television programs generally (or, in terms of the markets alleged by the Government, in the markets for network television programs shown on CBS or on ABC). This is so because all three networks face a common supply of programs.[4] The aggregate demand of the three networks is undiminished by the decree (*i.e.*, they will each remain free to schedule approximately 3 hours of programming per night and 21 hours per week), but the potential supply to meet that demand is decreased.

[4] Exhibit 7 to the Affidavit of Robert S. Rifkind, sworn to November 18, 1975, submitted in support of CBS's Motion for Summary Judgment on the Sherman Act Claims. That exhibit, which has not been challenged by the Government, shows for the 1970-71 through 1974-75 television seasons that 67 firms supplying approximately 63% of the three networks' prime time entertainment programming supplied at least two of the three networks and that 24 firms supplying approximately 57% of the total supplied all three networks.

This necessarily causes an effective reduction in the supply of programs available to CBS and ABC as well as NBC.[5]

The impact of the decree's restriction on NBC's production is economically significant even though NBC has not recently been a substantial producer of television programs. Indeed, even if NBC produced nothing, its status as a potential producer standing in the wings, with the capacity to produce and a vital interest in the adequacy of supply, would have a significant procompetitive impact. The proposed decree would eliminate NBC as a potential entrant. It must be noted, moreover, that the Government seeks the elimination not only of NBC but also of CBS and ABC as program suppliers.[6] Thus the reduction in supply or potential supply contemplated by the proposed decree would appear to be significant.

In view of the inherent anticompetitiveness of eliminating a supplier or potential supplier, I would have expected a statement assessing the "competitive impact" of the proposed decree to consider the obvious anticompetitive effects of the decree's production limitation. The CIS does not begin to analyze this important subject, however.

2. *The Decree Will Not Affect NBC's Alleged Status as a Monopsonist But Will Tend to Increase Concentration in the Supply Industry.*

I have shown above that the effect of Paragraph V of the proposed decree will be to diminish competition among

[5] The fact that the decree does not prevent NBC from selling to CBS or ABC is not of any practical consequence. No network could afford to depend on its close rival for any part of its regularly scheduled programming. It is easy to imagine the dilemmas that would arise if NBC were the supplier to CBS of a highly successful series such as "All In The Family".

[6] See Paragraph VII of the proposed decree.

program suppliers by removing NBC as a supplier and that the decree is thus inconsistent with a procompetitive public policy. Also inconsistent with such a policy are the provisions of the decree that seek to alter the terms on which NBC may deal with program suppliers. For example, under the decree a producer may not, when selling to NBC the network broadcast right to the initial episodes of a series, also sell to NBC the right to repeat network showings in subsequent seasons of more than three of those episodes[7] or the right to carry a program for more than four years[8] or the right to the exclusive broadcast use of a program throughout its network run.[9] Such an alteration by fiat of the terms of trade between networks and program suppliers will not alter NBC's alleged status as a monopsonist and indeed may well have the effect of further increasing concentration and restricting competition in the supply industry.

I find nothing in the proposed decree that would enhance the competitive constraints to which NBC is subject as a buyer. Such competitive constraints can only be imposed by NBC's actual or potential *competitors* in the purchase of programming—*i.e.*, other *buyers*, including, particularly, CBS and ABC. But there is nothing in the decree that affects NBC's relationships with CBS and ABC. Indeed, the Government specifically states that the decree is designed "to prevent [NBC] from being placed at a competitive disadvantage with respect to CBS or ABC" (CIS at 14). The Government's proposed alteration and regulation of the terms on which NBC may deal with its suppliers does

[7] Paragraph VI(H).

[8] Paragraph VI(E)(i).

[9] Paragraph VI(E)(ii)(a)-(c).

not increase competition among the buyers of network programming.

Indeed, since the decree does not increase such buyer's competition, it cannot affect any power NBC might have over the price it pays its suppliers, except to the extent that it suppresses competition among them. So long as NBC's suppliers compete with one another, they will bid the price of the rights they sell down to a competitive level, and NBC will pay a competitive price for those rights. When told that it can no longer buy all the rights it used to buy, NBC will pay less for the rights it continues to buy because it will be getting less. The suppliers, competing for NBC's favor, will accept less from NBC because they are getting more elsewhere. Indeed, the reduction in what NBC pays will be equivalent to the value to the supplier of the rights the supplier may no longer sell to NBC. The value to the supplier of those rights will be no greater than the value it received when it sold these rights to NBC since, by hypothesis, NBC bought the rights at a competitive price.

In sum, the effect of limiting the rights that NBC can buy from those suppliers will be to reduce, by the value of those rights, what NBC will pay to the suppliers, irrespective of whether NBC is a monopsonist or not. The decree's alteration of the terms of trade will enhance the aggregate remuneration of the suppliers only to the extent that it reduces competition among them. I show later that it is likely to do precisely that.

To say that the alteration of the terms of trade will not increase the competitive constraints to which NBC is subject as a buyer is by no means to say that the provisions of the decree that effect this alteration are economically irrelevant. Indeed, a decree which restricts the rights that may be bought and sold might in itself be thought a restraint of

trade. Obviously certain restraints of trade—such as an agreement to buy a barber shop only if the seller agrees not to open a new barber shop across the street—may be needed for the functioning of the market. But I foresee no such effects from this decree's restrictions; on the contrary, there may well be further harmful effects.

For example, to preclude program suppliers, when selling to NBC network broadcast rights to the initial episodes of a series, from also selling NBC the right to repeat network showings in subsequent seasons of all such episodes would not seem to serve any procompetitive purpose where NBC perceives a popular demand for additional broadcasts. If a network wants to pay for such repeats because it believes it will have an audience for them, and if the supplier is willing to sell the right to such repeats, how will competition be promoted by forbidding such a transaction?

Moreover, such a restriction could be affirmatively harmful in at least two respects. First, if a network, at the time it contracts to buy original episodes, cannot also contract to buy repeats, it will pay less for what it is getting in the original transaction.[10] Since it will be paying less at a time when the program supplier is incurring production costs, the result will be artificially to force back on to the program supplier the risk that the value of the repeats will prove to be little or nothing because the show has had little or no success. If the show is successful, the supplier will win, if unsuccessful he will lose, but he will in any case be *forced* to accept the gamble and deeper "deficit financing". Second, the prohibition on the purchase of repeat rights will, as a practical matter,

[10] An option to run repeats of a series in future years obviously has a present value and that value necessarily affects the level of "up front" network payments for outline, script, pilot and the initial episodes of a series.

preclude a network from abandoning the current practice of running original and repeat episodes in the same year in favor of running, for example, only originals in the first year and only repeats in the second. Since such a pattern would be extremely expensive in the first year, it would be commercially feasible only if the network knew at the outset that the second year would be correspondingly inexpensive so that the aggregate cost would be approximately the same. The decree, however, would preclude such a new pattern for running repeats and would essentially lock the networks into the present pattern. Thus, they would be prevented from trying to compete with one another by organizing their program formats in novel ways.

One might as well tell an author that he cannot sell the right to the publication of more than 5,000 hard cover copies of a book, even though he has a publisher who wants to pay for the right to print 10,000 copies. Even if such a restriction would accelerate reissue in paperback, it hardly helps the author to realize the maximum value from his work in his dealings with the publisher or the publisher to employ his resources in the manner he deems most efficient.

Similarly, it is hard to see the economic utility of the provision in the decree proscribing the sale of an option for more than four years.[11] By forcing program suppliers to sell fewer years "up front" and thus to be paid less "up front",[12] this provision would force them to take

[11] Paragraph VI(E)(i).

[12] The option to run a series in future years, just like the option to run repeats discussed above, has a present value that affects the level of "up front" payments for outline, script, pilot and the initial episodes of a series. Thus, to limit the number of options for future years of a program that may be sold will have the effect of reducing these "up front" payments.

the risk that the rights to the fifth and later years, which they can no longer sell at the outset, will be worth little or nothing because the program has had little or no success in the earlier years. In short, they would be substantially restrained in seeking to lay off their risks. By comparison, authors selling books to publishers are not forbidden from selling at the outset the right to keep the book in print after four years. Such a prohibition might ultimately enrich the authors of books that turned out to be long-lived best sellers, but it would surely reduce the incomes of the rest.

In general, it may be said of the decree's proposals concerning the terms of trade that they will tend to reduce the initial funding that program suppliers will receive from the networks. In light of the Government's assertion that so-called "deficit financing" by producers is an evil to be eliminated,[13] the decree's alteration of the terms of trade in a fashion that must reduce the flow of funds from the network at the early stages of production and broadcast is particularly odd since it will exacerbate the alleged evil.[14]

[13] Memorandum of the United States in Opposition to Defendants' Motions for Summary Judgment on the Sherman Act Claims, dated January 19, 1976, at 10, 20.

[14] I recognize that to some extent the proposed decree tracks the FCC's financial interest rule. 47 C.F.R. § 73.658(j)(ii). There is good reason to believe that that rule has had precisely the effect that I suggest. Thus, Edward A. Montanus, Vice President of MGM-TV, is quoted in Exhibit 4(a) (p. 52) of the affidavit of Bernard M. Hollander, sworn to January 19, 1976, as follows:

> "When the networks were allowed to invest in shows for a minority interest, they assumed much of the burden that represents our deficit financing today."

See also Crandall, "FCC Regulation, Monopsony, and Network Television Program Costs", 3 *Bell Journal of Economics and Management Science* 483 (1972). This article is appended to this affidavit as Exhibit 2.

The most important result of the alteration of the terms of trade by the proposed decree may be a substantial increase of concentration and restriction of competition among program suppliers. Under the proposed decree, program suppliers will have to find alternative means of realizing the value of the rights they are prohibited from selling to the networks. In principle, the suppliers will have to decide whether to sell those rights at the outset or to hold them for later exploitation. The latter course necessarily involves assuming the risk that the rights will prove to be of little or no value because the program has enjoyed little or no popularity. It also necessarily involves deferring for some appreciable period of time cashing in on whatever value those rights may have.

Some suppliers may be happy to assume those risks and be financially capable of deferring the receipt of cash. Others may be either unwilling or unable to do so. This group is likely to include suppliers "yet unborn" who will be detered from entry by the necessity of bearing increased risks. It would also include those already in the industry who are financially weak or risk averse, such as new, independent producers struggling to establish themselves. Such producers will presumably seek new buyers for the rights they can no longer sell to the networks. If they fail to find buyers, they may go out of business, either because they are unwilling to gamble on the success of their programs or because they will lack the financial resources needed to produce programs of a quality that will compete successfully. In either case, the result will be to concentrate production in the large, well-established firms, notably the major motion picture studios (some of which are subsidiaries of large conglomerates) which already enjoy the lion's share of the production business (as explained more fully below).

If producers do find buyers for these rights, who are the buyers likely to be? Three principal buyers—the three networks—will have been forced out of the market by the NBC decree and its counterparts. The most likely alternative buyers are the firms that are already in the business of acquiring such rights—again, the major studios. It is extremely doubtful that any procompetitive purpose would be served by forcing the financially weaker producers to seek financing from their competitors by forbidding them from obtaining financing from their customers.

It must be noted that the major studios (Universal, MGM, 20th Century-Fox, Warner Brothers, Paramount, Columbia Pictures) already occupy a large share of that market, with Universal in particular supplying a very high share of the programs carried by NBC.[15] Whatever the relationship between concentration and competition, it is odd that the Government should propose a decree in an antitrust suit that promotes concentration among program suppliers, particularly where the Government contends that competition among those suppliers has been restrained. Concentration resulting from the superior skill, foresight and industry of some competitors is one thing; concentration procured by fiat is quite another; and concentration resulting directly from a decree ostensibly intended to enforce the antitrust law is simply absurd.

I have carefully reviewed the CIS to see whether it deals with the prospect that the shifting of risks resulting

[15] Appended to this affidavit as Exhibit 3 is a chart that appeared in *Variety* on September 15, 1976, which identifies the suppliers of regularly scheduled, network prime time programs for the current 1976-77 season. (While this chart does not also identify the suppliers of the eleven and one-half hours per week of movies carried by the networks, it is commonly known that such programming, which this season constitutes over 18% of the networks' prime time entertainment schedule, is supplied mainly by the major Hollywood studios.)

from the decree's restrictions on the terms of trade will increase concentration and restrict competition among program suppliers. As stated, the CIS is completely silent on this question as on most questions having to do with competition rather than with protection of suppliers.

Conclusion

The focus of the decree and the CIS suggests that the Government's principal concern is in assuring producers a "reasonable" price for their goods. That can only be achieved by substituting a regulatory regime for a competitive market because under competition goods change hands at the market price—and not a price that can be said by the Government to be abstractly "fair" or "reasonable". The decree serves the Government's apparent purposes to the extent that it substitutes regulation for competition. But regulation seldom succeeds in achieving the same desirable allocation of resources that results under competition. Indeed, there are usually inherent economic inefficiencies in regulation, not the least of which are the costs, burdens and delays of administering the regulatory regime.

The provisions in the proposed consent decree which are supposed to affect competition will be likely to decrease the very competition which the complaint claims NBC has, inexplicably, restrained, namely the competition among program suppliers. The decree will reduce the number of actual or potential suppliers of programs and the total supply of programs. Further, by restricting what producers may sell and networks may buy, the decree will not alter NBC's alleged status as a monopsonist but will probably

lead to greater concentration in the production of programming and impair the ability of new, weak or risk-averse program suppliers to compete with the large, established studios.

/s/ Franklin M. Fisher
Franklin M. Fisher

Sworn to before me this
22nd day of February, 1977.
/s/ Albert F. Marcellino
Notary Public, State of New York
No. 43-2519700
Qualified in Richmond County
Certificate filed in New York County
Commission Expires March 30, 1977

[Exhibits Omitted—See full text at 42 Fed. Reg. 25209-30 (1977)]

Affidavit of Richard A. Posner

AFFIDAVIT OF RICHARD A. POSNER

STATE OF ILLINOIS }
COUNTY OF COOK } ss.:

RICHARD A. POSNER, being duly sworn, deposes and says:

I am a Professor of Law at the University of Chicago Law School, specializing in antitrust law. My curriculum vitae, including a list of the books and articles I have written, is annexed hereto as Exhibit 1. Counsel for CBS Inc. has asked me to examine the proposed consent decree in *United States* v. *National Broadcasting Company, Inc.* (Civil Action No. 74-3601-RJK, C.D. Cal.), together with the other documents filed in the case, including the Justice Department's Competitive Impact Statement ("CIS"), with a view to advising whether the decree is consistent with the "public interest", the standard governing entry of antitrust consent decrees under the Antitrust Penalties and Procedure Act ("APPA"), 15 U.S.C. § 16. My conclusion is that the proposed decree is inconsistent with the public interest as expressed by the Sherman Act.

The legislative history of the APPA makes clear that the purpose of the Act is to bar the entry of antitrust consent decrees that do not advance the policy of the antitrust laws, which is to promote competition. "The primary focus of the Department's enforcement policy should be to obtain a judgment—whether litigated or consensual—which protects the public by insuring healthy competition in the future". S. Rep. No. 93-298, 93d Cong., 1st Ses. 6 (1973). The proposed consent decree in *NBC* will not insure "healthy competition"; on the contrary, it is an anticompetitive decree.

Affidavit of Richard A. Posner

I.

The main thrust of the decree is to limit the rights (*e.g.*, to a later syndication of the program) that NBC may acquire from a producer of programs. The value of such rights tends to be highly uncertain; hence the effect of contracts that transfer these rights to the network is to have the network assume the risk that the program will not be successful enough to make the various secondary or residual rights in it commercially valuable. This shifting of risk from producer to network is a boon for the small producer, who may be in no position financially to assume the risks of failure involved in retaining all of the rights to subsequent exploitation of the program. The effect of the proposed consent decree, if adopted, would be to force this risk back on to the producer. That can only weaken the position of the small producer in a market where the major sellers are large producers. Such a result would be antithetical to the policy of the antitrust laws.

The proposed decree is further anticompetitive in limiting the program production by NBC itself. NBC is a small factor in the program production market (certainly small relative to its principal supplier, MCA), but its competitive potential is significant and presumably helps keep the independent producers "on their toes". They know that if they try to cartelize the market NBC can step in and satisfy a major part of its programming needs internally. The Supreme Court has repeatedly emphasized the importance of preserving potential competition in concentrated markets. *See, e.g., United States* v. *Penn-Olin Chem. Co.*, 378 U.S. 158 (1964). And the Ninth Circuit in a recent case specifically indicated its disfavor for provisions in antitrust decrees limiting production by a potential competitor. *See Calnetics*

Corp. v. *Volkswagen of America,* 532 F.2d 674, 693-94 (1976).

The entry of an antitrust decree having such serious anticompetitive features as I have outlined, without any effort at responsible justification by the government in its CIS, would flout the purposes of the APPA. And there is still another consideration that suggests to me that the decree is not in the public interest: its "regulatory" character, which the government acknowledges in its CIS (p. 9). The entry of a regulatory decree is almost a sure sign that the case should never have been brought. The purpose of the antitrust laws is to promote free competition by dissolving restraints of trade and not, as in the proposed decree in this case, to supervise the details of bargaining between buyers and sellers. *See* Posner, *Antitrust: Cases, Economic Notes, and Other Materials* 563-65 (1974); Posner, "A Statistical Study of Antitrust Enforcement", 13 *J. Law & Econ.* 365, 386, 388 (1970). Apart from the unsuitableness of regulatory decrees in the implementation of a statute designed to promote competition as an alternative to regulation, such decrees impose unreasonable burdens on the time and expertise of the federal district courts, which become charged—as will be true in this case if the proposed decree is entered—with the detailed supervision of ongoing commercial relationships.

II.

The proposed decree in its present form is I think manifestly contrary to the statutory standard. But its deficiencies are not mere matters of wording or the inclusion of this rather than that provision. The decree seems based on a legal theory that has no basis in the antitrust laws. The government needs to rethink the whole case.

The basic premise of the decree is that NBC has combined with the television stations comprising the NBC television network to suppress competition in the production of prime time television programs carried on the network, or alternatively that NBC has monopolized this programming. The government's CIS states that NBC has "used and continues to use its dominance and control over access to the broadcasting time of the NBC Television Network, to condition independent program suppliers' access to said network upon the suppliers' relinquishing valuable rights and interests in their programs", and that NBC "has favored programs in which it obtained such rights and interests over other programs" (p. 6). While recognizing that NBC itself produces only a minute fraction of the prime time entertainment programs broadcast over its network, the government also expresses concern "that NBC's unrestricted ability to produce prime time television entertainment programming" has unlawfully restricted "independent program suppliers' ability to produce and negotiate for distribution and exhibition of their programming". *Id.*

It seems plain from the language quoted above, the terms of the decree, and the government's earlier filings in the network cases that the government's theory of how NBC and the other two major networks have reduced competition in the production of television programs is simply that they have driven an unconscionably hard bargain with the producers—or, as the government put it in its memorandum in opposition to CBS's motion for summary judgment, that the networks failed to give the producer "payment commensurate with the success of his program" (p. 20), thereby inflicting "undue hardship" on the producers (p. 10). This theory of the violation that the proposed consent decree is designed to rectify lacks a basis in either common sense or

antitrust law. Why would the networks wish to eliminate competition among their program suppliers? A rational network would take every step possible to maximize such competition in order to keep down the prices of programs it buys. Of course the networks want to pay as little for programs as possible—that is why they want to promote rather than to stifle competition among the producers.

Firms may want to reduce competition in the markets in which *they sell,* but they have absolutely no interest in reducing competition among their suppliers, thereby possibly placing themselves at the mercy of a cartel of suppliers or a monopoly supplier. The proposed decree is thus premised on a completely unrealistic conception of network self-interest. Further, in seeking to rectify an alleged inequality of bargaining power between producers and networks that has allegedly enabled the networks to drive an unconscionably hard bargain with the producers, the decree strays outside the recognized boundaries of the antitrust laws. No antitrust cause of action is stated by an allegation that a buyer has refused to pay a fair price to a seller. The antitrust laws—unlike the Uniform Commercial Code or the Automobile Dealers Day in Court Act—have never before been thought to provide a remedy for a seller to whom a buyer pays an unconscionably low price. A one-sided sales contract is simply not a restraint of trade.

It should be emphasized that the contractual provisions between NBC and the producers about which the government complains are simply provisions allocating the various profit opportunities created by the contract between the parties to it in a way that may be less favorable to the supplier than alternative provisions would be. For example, the government complains about the practice, prohibited by the FCC since 1971, whereby NBC received not only the right to show the program on its network but also shared in

the revenues from subsequent broadcasts of the program by independent television stations. In effect, that practice simply reduced the price that NBC paid the producer for network exhibition—and as I have said there is nothing in the antitrust laws that gives a seller the right to complain about the price in his contract with the buyer. To treat a contract of sale as an unreasonable restraint of trade because the advantages of the contract appear to inure primarily to the benefit of the seller rather than the buyer, or of the buyer rather than the seller, would be to alter fundamentally the character of the antitrust laws and cast a cloud of suspicion over virtually all sales contracts.

I have said this is a case, utterly unprecedented in antitrust jurisprudence, in which the gravamen of the complaint is that the buyer has driven a hard bargain with his sellers. The character of the case as I have described it would not be altered by the allegations that NBC has monopoly power even if those allegations had any possible basis in fact. The offense of monopolization is defined in the Supreme Court's most recent formulation (*see United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)) as monopoly power plus exclusionary practices, *i.e.*, practices designed to punish, destroy, or intimidate a competitor or potential competitor of the monopolist. I know of no case where charging customers high prices, or paying suppliers low prices, has itself been deemed an act of monopolization.

In any event, it is plain as a matter of law that NBC does not have monopoly power. The government concedes that the programs broadcast on the NBC network compete for viewers' and therefore advertisers' patronage with the programs shown on the other two networks (not to mention the programs shown on the many independent television stations). Since each of the television networks carries

approximately the same amount of prime time programming as the others, it follows that NBC purchases at most one-third of the programming at issue in this case. A firm that purchases only one-third of a product can under no accepted judicial doctrine be deemed a monopolist.

The government appears to concede this, but argues that the NBC television network is itself a relevant market somehow separable from the broader market for prime time network television. This approach is untenable. To fragment a market into the individual outputs of each of the sellers, or the purchases of each of the buyers, in the market is to make every firm a monopolist and to expand enormously the reach of Section 2 of the Sherman Act. Hence the courts have consistently held that the "natural monopoly" that the producer has over his own output is not the kind of monopoly with which Section 2 is concerned. *See, e.g., United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 392-94 (1956); *Telex Corp.* v. *International Business Machines Corp.*, 510 F.2d 894, 917-19 (10th Cir. 1975); *ALW, Inc.* v. *United Airlines, Inc.*, 510 F.2d 52, 55-57 (9th Cir. 1975); *Bushie* v. *Stenocord Corp.*, 460 F.2d 116, 120-21 (9th Cir. 1972). That principle applies *a fortiori* to a case where the firms in question, CBS, NBC, and ABC, are purchasing from a common pool of program suppliers who can sell to any one of the networks. The differences among the programming carried by the three networks seem to be even smaller than those which distinguish, say, Chevrolet and Ford automobiles—different brands recognized to be in the same product market, even though General Motors and Ford have sought to differentiate their products in minor but significant ways. *See, e.g., Mogul* v. *General Motors Corp.*, 391 F. Supp. 1305, 1313 (E.D. Pa. 1975), *aff'd*, 527 F.2d 645 (3d Cir. 1976); *Merit Motors, Inc.* v. *Chrysler*

Corp., 417 F. Supp. 263, 269 (D.D.C. 1976). In contrast, very few viewers, simply by looking at a television program, could tell whether it was a CBS, an NBC or an ABC program.

It is true that once the network has signed a contract with the producer for a particular program idea, the contract will usually obligate the producer to offer the completed program to the network. But this is to say that the relevant competition among the networks for programming occurs at the point at which the producer has come up with an idea for a program that he thinks is marketable. He can peddle his program idea to any of the three networks. Their competition for promising program ideas assures that none of the networks has a monopoly in the purchase of programming.

The facts I have recited to show that this case and the proposed decree have no relation to the objectives of antitrust policy, which are to prevent monopoly and foster competition, are not in dispute. The government claims it can also prove the allegedly improper purpose of each defendant in using its control over access to its network to force the program suppliers to give up certain interests in their programs. But the only improper purpose suggested is that each defendant deliberately uses whatever bargaining power it may have to drive a hard bargain, one that involves annexing to itself as many of the profit opportunities created by the program in question as it can. And, as I have emphasized, the use of individual bargaining power to minimize the cost of program acquisition, while conceivably objectionable on other social grounds, raises no question of illegality under the antitrust laws.

Nor is anything significant added to the case by the fact that the programs offered by the networks are carried by a

large number of affiliated stations or that the networks produce some television entertainment programs themselves. The existence of station affiliations and of some internal production by the networks does not change the antitrust issues. That NBC owns some stations and has affiliation agreements with others adds nothing to a complaint that NBC is not paying enough to the independent television producers. Ford Motor Company sells its automobiles to the public through a system of franchised dealers, most of whom purchase exclusively from Ford. But a supplier of steel to Ford could not on that account complain under the antitrust laws that Ford was not paying him a high enough price to keep him in business. There is simply no right under the antitrust laws to demand a "reasonable" price from a supplier; the buyer's distribution system is irrelevant. This case involving the market for programs would be no different if NBC owned all of its affiliated stations. NBC might be stronger as a buyer of television programs, but it would still not have a monopoly position in the relevant market—the market in which it competes with ABC and CBS in the purchase of programs—and its contracts with its suppliers would still not be reviewable by an antitrust court for adequacy of consideration.

Equally irrelevant is the fact that NBC produces some of the entertainment programming shown on its network (though less than 5 percent of it). One can imagine an antitrust case whose gravamen was that NBC had a monopoly in one market (program distribution) which it was using to take over a related market (program production). But that is not this case. Not only is the premise (monopoly in one market) false, but NBC's small market share as a producer refutes any suggestion that it has been seeking to take over the production of all of its own programs. More-

over, even if NBC produced all of its own programming, its market share as a producer would be no higher than its current market share as a buyer. Since it is not claimed that ABC and CBS could be compelled to buy their programs from NBC, its market share as a producer cannot be more than approximately one-third. But, if NBC cannot produce more than one-third of the total programs, it cannot be deemed a monopolist of production any more than it can be deemed a monopoly buyer. Presumably the complaint is that NBC is trying to depress the profitability of the independent producer industry in order to increase its own *network* profits, and not in order to increase its own market share in the production of network programming.

NBC's affiliation agreements and its internal production are red herrings in this case. The Government here is challenging the terms on which NBC buys television programs. The Government claims these terms are too hard, impose undue hardships on the independent producers and have impaired the vigor of competition among them. These allegations are irrelevant to the antitrust claims. NBC has very good commercial reasons for wanting to have a large number of suppliers vigorously competing for NBC's business, but NBC has no duty under the antitrust laws to pay a supplier a price that will keep him in business. Relatively inefficient suppliers when faced with competition from other producers offering similar products at lower prices may indeed be driven out of business. But that is the result of competition and not the suppression of competition. The antitrust laws were enacted for "the protection of *competition,* not *competitors*". *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 320 (1962).

My point is not that the government's case against NBC has legal infirmities; that would not be decisive on the ques-

tion whether this Court should enter a consent decree. My point is rather that the case is so devoid of even a colorable claim of an antitrust violation that a decree based on the theory of the complaint cannot be deemed "in the public interest", even if the defendant, for whatever private reasons it may have, is inclined to accept the decree rather than litigate. The Antitrust Penalties and Procedure Act requires this Court to make an independent judgment whether the proposed decree is in the public interest. To be in the public interest under the Act a decree must be, at the very least, reasonably related to the policy of the antitrust laws. The proposed decree, even if it could somehow be purged of the anticompetitive features discussed at the outset, would not be reasonably related to the policy of those laws.

[SEAL: Gladys Fuller,
Notary Public
Cook County, Ill.]

/s/ RICHARD A. POSNER
Richard A. Posner

Sworn to before me this
23rd day of February 1977.
/s/ GLADYS FULLER
Notary Public

[Exhibit Omitted—See full text at 42 Fed. Reg. 25238-41 (1977)]

Affidavit of William J. Baumol

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM J. BAUMOL, being duly sworn, deposes and says:

I am professor of economics at Princeton University and New York University. My qualifications are summarized in Exhibit 1.

I have been asked by counsel for CBS Inc. to comment upon the probable competitive consequences of the proposed consent decree submitted to the Court in *United States* v. *National Broadcasting Company* on November 17, 1976. I have examined the proposed judgment, the Justice Department's competitive impact statement, and the comments on the proposed decree, dated March 1, 1977, of CBS, of Columbia Pictures Industries, et al., and of United Artists Corp., et al.

On the basis of the information obtained from these sources, I can only conclude that the effect of the proposed decree will be to inhibit competition and will certainly not promote competition in the production of television programs.

The proposed consent decree in *United States* v. *National Broadcasting Company* represents an attempt to deal with alleged acts of restraint and monopolization through the imposition of cartel-like constraints upon entry into programming activities by NBC. It serves to provide a protected enclave to firms which would otherwise be subjected to more effective competition by NBC—precisely the goal of any cartel arrangement.

Restrictions upon entry, and upon the competitive activities of relatively large firms are devices which the Department of Justice claims will enhance competition in the affected market. But those restrictions are misguided, and their effects are likely to be very different from what is claimed for them. The Department of Justice asserts or implies that the restrictions are designed to preserve or enhance competition, but by preventing entry and restricting competitive activities they can only undermine it. The Department further asserts that such measures are designed to protect the public welfare, but in fact they will only serve to increase product prices, and those price increases will ultimately be borne, directly or indirectly, by the consuming public.

The terms of the proposed consent decree will, indeed, make for higher prices of television programs, in at least two ways: first, by effectively decreasing the number of suppliers who can compete in the provision of programs; second, by restricting the right of NBC to purchase future uses of programs, it shifts the risks of program production to the suppliers, including the smaller firms who can be presumed to be in a poorer position to bear them.

Restrictions upon the productive activities of large firms are a cosmetic operation whose effect is to impose an appearance of competition upon a market. But in imposing the appearance of competition such measures unavoidably undermine its substance. Such restrictions protect only the interests of those whom they shield from competition.

In short, the proposed consent decree cannot in any sense be construed as a device which will prevent monopoly or restraint of trade. On the contrary, the proposed decree would itself introduce constraints upon trade which are in

conflict with true competition, and with the interests of the general public.

/s/ WILLIAM J. BAUMOL

Subscribed and sworn to
before me this 18th day of
March, 1977.

/s/ MELVIN GOLDSTEIN
Melvin Goldstein
Notary Public, State of New York
No. 30-1452370
Certified in New York County
Term Expires March 26, 1977

[Exhibits Omitted]

Affidavit of Paul L. Joskow

AFFIDAVIT OF PAUL L. JOSKOW

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX } ss.:

PAUL L. JOSKOW, being duly sworn, deposes and says:

I am an Associate Professor of Economics at the Massachusetts Institute of Technology. My qualifications as an economist are set forth in Exhibit 1 hereto.

At the request of counsel for CBS Inc., I have examined the complaint in *United States* v. *National Broadcasting Company*, the proposed consent decree and the associated Competitive Impact Statement (the "CIS") submitted by the Justice Department, as well as the comments on the proposed consent decree submitted by CBS, Columbia Pictures Industries, *et al.* (the "Columbia Pictures Group"), United Artists Corporation and Metro-Goldwyn-Mayer (the "United Artists Group"), and by the American Television & Communications Corp., *et al.*, and the National Cable Television Association, Inc. (the "Pay Cable Group"). I have studied those documents carefully with respect to the effects of the proposed decree on competition and economic efficiency. It is my opinion that the primary effects of the proposed consent decree will be the following:

1. The decree will restrict competition among program suppliers by reducing the number of actual and potential suppliers of programs and the total supply of programs the effect of which may be to increase program prices.

2. The decree seeks to circumvent the determination of programming prices through a free market by substituting a complicated regulatory regime for a competitive market. Such a regulatory regime will be difficult and

costly for the courts to administer and, if history is any guide, is likely to lead to economic results which are less desirable than those that would flow from a free market.

3. The proposed decree would put the Court in direct conflict with the Federal Communications Commission (FCC) as the regulator of trade between the networks and their suppliers. Such potential conflicts are likely to result in large economic inefficiencies associated with the additional costs and delays inherent in administering two conflicting regulatory regimes. There is no evidence that the benefits of the decree can justify the resulting costs of this bifurcation of regulatory authority. On the contrary, since the primary effect of the decree is to restrict competition, which is a cost rather than a benefit, the resulting costs of jurisdictional conflict are unjustifiable.

These conclusions are supported by the comments submitted by CBS and the accompanying affidavit of Professor Franklin M. Fisher, with which I fully agree. Moreover, they are confirmed by the comments of the major motion picture studios and the pay cable companies referred to above. Those comments reinforce the conclusion that the proposed decree would lead to a reduction in competition, increased programming costs, and the waste of resources associated with administrative duplication.

Those comments also demonstrate quite clearly that the primary interest of the major producers and distributors is that the decree result in higher prices for their products. They argue that anything that would lead to lower prices is somehow anticompetitive. The way in which these producers and distributors can obtain higher prices for their products is of course not by promoting competition, but by restraining it or by having the court restrain it on their behalf.

Those large established producers and distributors have the most to gain by the effects that the proposed consent decree will have in reducing the number of actual and potential suppliers of programs and the total supply of programs. Having substantial resources these producers will not be as seriously affected as will the smaller producers in the market and potential entrants by the reduction in the flow of funds from the networks at the early stages of production resulting from the limitations on the terms of trade contained in the proposed decree. Small producers and potential entrants unable to realize the full value of the rights to their programs from the networks may be unwilling or unable to assume the increased risks which they will be forced to bear and may be forced out of the market. To the extent that life is made much more difficult for the smaller producers and entry becomes more difficult for potential competitors, the major studios and distributors only stand to gain by the reduction in competition that would result. In addition, to the extent that small producers or new entrants can find buyers for the rights they may not sell to the networks, the major studios, their competitors, are the most likely buyers. Forcing the small producers to go to their competitors for financing does not promote competition in the supply of programs.

It is not surprising that the producers and distributors urge that the proposed consent decree does not go as far as it might in reducing competition and increasing prices. Hence their comments urge that the Justice Department do better by restricting competition even further.

The Columbia Pictures Group asks us to believe that the effect of the existence of the three networks has been to reduce the relevant buying market from approximately 700

local VHF television stations to only three buyers, the networks, and that this has drastically reduced competition among buyers of programming (Columbia Pictures Group comments, pp. 11-13). The comparison of the 700 local VHF stations with the three networks provides no evidence of a reduction in competition. A local station in Salt Lake City competes with other stations in the Salt Lake City area, but it certainly does not compete with the stations in Boston or Los Angeles and all the other cities beyond the reach of its broadcast signal. Since NBC has only one affiliate in each local broadcast area, the affiliation arrangements do not reduce either the number of buyers in any market or the competition among them.

This is not to say that the networks have no economic significance. There is reason to believe that there are substantial efficiencies associated with networking. Indeed various producers have recognized that they share in the benefits flowing from these efficiencies. For example:

> ". . . without exception all of the independent producers now making sales to the networks, including MCA, demonstrated [before the FCC] why they could not hope to profitably sell programs of the type and quality they had been producing for the networks directly to the stations or to a sponsor." MCA's Memorandum in Support of Motion for Stay, dated September 28, 1970, at 25, *Columbia Broadcasting System, Inc.* v. *FCC*, Civil No. 35, 246.

In sum since the 200 stations affiliated with NBC generally could not compete with one another for programming, their affiliation with NBC cannot possibly lead to a restraint of trade among them for first-run programming or any other kind of programming for that matter.

The Columbia Pictures Group characterizes a network as a common buying arrangement for programming and common selling arrangement for advertising on behalf of local stations affiliated with it. Such a characterization gives the erroneous impression that a common buying and selling arrangement of a network inherently organizes its affiliates so as to restrain trade among them. Whether or not a television network can properly be characterized as a common buying or selling agency—a question on which I express no opinion—the significance ascribed to that characterization by the Columbia Pictures Group does not follow. A common buying agency for a group of firms that are in competition with one another may indeed restrain trade by eliminating that competition. But a common buying agency for firms that are not in competition with each other cannot have that effect because there is no competition to eliminate. Since the stations affiliated with NBC do not compete with each other for programming, their affiliation with NBC does not eliminate any competition among them, even assuming that NBC should be characterized as a common buying agency for them. On the other hand, an organization which buys and sells for local TV stations which are not in competition with one another can reduce the transaction costs that would otherwise be associated with a large number of bilateral transactions, thereby reducing the prices of programs and facilitating access to the local stations.

Both the Columbia Pictures Group and the United Artists Group object to the internal production of programming by the networks. But the small amount of internal production that each of the networks individually undertakes, and their capacity to produce more if either the prices or the quality of independent programming is

unacceptable, provides an important additional competitive force which by increasing the supply of programs and potential competition insures that programs can be purchased by all at the lowest costs possible. The United Artists Group comments demonstrate this effect quite clearly when they indicate (United Artists Group, pp. 3-4) that the effect of the entry of ABC and CBS into the production of theatrical films in the late 1960's was to lower prices paid for motion pictures, not only for them but for NBC as well. It is not surprising that the producers should object to internal production by the networks because the resulting competition tends to reduce prices rather than to raise them as the producers would like. Internal production *is* a competitive threat to other producers in the market. Internal production *does* allow the networks a supply alternative if independent programming costs get too high. Internal production may make life difficult for particular competitors if they try to raise their programming prices above the costs of production or do not provide the diversity of programs demanded by viewers. *This is the essence of competition.* The public interest is served by preserving competition, not by sheltering particular competitors.

The networks' ability and willingness to provide their own programming if the costs or quality available elsewhere are not as attractive is an important force *preserving* competition in program supply not restricting it. The independent producers would certainly like to see the networks eliminated as competitors in the hope that the resulting reduction in competition in program supply will allow them to increase their prices. But, much as the independent producers would like competition to be reduced, it must be emphasized that such actions are likely only to lead to

an increase in the price of programs. In my opinion, the proposed consent decree, to the extent that it restricts the network's ability to act as a potent competitive force in the program supply area, is most unfortunate since its primary effect will be to reduce competition in the supply of programming and increase the cost of programming purchased by the networks. To follow the producers' and distributors' suggestion that internal production be limited even more will only serve to reduce competition further with the ultimate result being even higher programming costs.

Internal production is also important in another way for promoting competition in program supply. The networks produce only a very small proportion of their total programs internally. As a result, the cost of most of their programming depends on the terms which they can negotiate with independent producers. But the price arrived at in such negotiations depends heavily on the anticipated costs of the program. As part of their bargaining strategies suppliers may inflate cost estimates to secure higher contract prices. The networks' own internal programming activities allow them more easily to determine whether the program cost estimates they are presented with are reasonable or not. Their own programming costs, therefore, serve as a "yardstick" against which the proposed program budgets of independent suppliers can be evaluated. This yardstick will tend to promote competition by increasing the availability of information on true programming costs and will help insure that programs are made available at the lowest prices possible. The elimination of this yardstick will make it easier for producers to get away with inflated cost estimates.

The comments of the Columbia Pictures Group seem to place great weight on the observation that the contracting

terms offered by all three networks are similar. Their comments give the impression that similarities in contracting terms evidence a lack of competition among the networks. Whether or not the terms are in fact similar, common terms of trade are equally consistent with vigorous competition. Common contracting terms would be expected to result from the efforts of each of the networks, acting independently in pursuit of its individual self-interest, to obtain the best terms that it can while still eliciting the necessary supply of programming from the market.

Nor is the observation by the Columbia Pictures Group (page 19) that NBC and the other networks make large profits on successful shows necessarily evidence a lack of competition among them. The observation itself is meaningless without proper consideration of the uncertainties associated with program procurement. Since producers evidently expect the networks to bear substantial risks associated with programs in their initial phases of production, advancing money for development and production that will not be returned if the program fails, it is altogether unreasonable for them then to urge that the profits associated with a very successful program are evidence of anticompetitive behavior.

The comments of the Pay Cable Groups are directed almost entirely to the fact that the decree does not forbid NBC from buying broadcast rights that are exclusive as against pay cable. (*See* Section VI(E) (iii).) The Pay Cable Group seeks to have the Court place metes and bounds on exclusivity different than those which currently result from competition among the networks. But the one thing that clearly emerges from the comments is that the question of the appropriate dimension of such exclusivity cannot be isolated from the rather elaborate regulatory

matrix created by the FCC. Indeed I think any attempt to deal with the question on a piecemeal basis cannot be successful.

The FCC's 3-10 rule already regulates pay cable's access to feature films. Issues surrounding the nature of the expansion of the cable TV industry are of significant concern to the FCC and involve a host of interrelated issues that affect the entire broadcast industry and its ability to serve the public interest to the greatest extent possible. To try to deal with these issues independently and concurrently in two separate forums precludes effective consideration of the whole range of public policy issues involved. Efforts to establish "countervailing" rules and regulations through the direct use of the antitrust laws to counteract alleged anticompetitive decisions of the FCC would inevitably lead to confusion for all concerned and the continuous involvement of the courts as countervailing antitrust rules and regulations must be adapted to the actions of the FCC. The potential economic costs of such a state of affairs loom so large that movement in this direction should not be sanctioned without a complete evaluation of the associated costs and benefits and careful consideration of alternatives that might insure that the FCC gives the appropriate weight to competitive considerations in formulating its regulatory policy. Neither the consent decree not the CIS presents enough information to perform properly such a cost benefft analysis or provides any persuasive arguments that superior means for pursuing the same policy goals are not available.

As I have shown above, the comments of the Columbia Pictures Group, the United Artists Group and the Pay Cable Groups all urge that the decree be amended or rejected. I agree that the decree should be rejected, but it is

important that it be done for the right reasons and not in order to feather the nests of those who would be benefited by the restraint of competition. I believe further that the overriding thrust of the decree is so heavily weighted toward the suppression of competition, the increase in the prices of programming and increases in administrative costs, without having any perceivable effect on the alleged monopsony power of NBC or alleged parallel behavior of the networks, that the very basis of the antitrust action is questionable and should be scrutinized with great care.

/s/ PAUL L. JOSKOW

Subscribed and sworn to before me this
24th day of March, 1977.

/s/ LOUIS T. RICCI
Notary Public

[Exhibits Omitted]

Supreme Court, U. S.
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No. 78-1685

In the Supreme Court of the United States

OCTOBER TERM, 1978

CBS INC., PETITIONER

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 7a) is not reported. The opinion of the district court (Pet. App. 41a-81a) is reported at 449 F. Supp. 1127.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1978. A petition for rehearing was denied on February 5, 1979 (Pet. App. 8a). The petition for a writ of certiorari was filed on May 7, 1979 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in declining to issue mandamus, at the behest of one not a party to the case, to vacate a consent judgment entered by the district court.

STATEMENT

On December 10, 1974, the United States filed a complaint charging that the National Broadcasting Company, Inc. ("NBC") had combined with its affiliated stations to use its control over access to network air time to restrain and monopolize prime time television entertainment programming exhibited on that network, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2 (Pet. App. 9a-19a). Identical complaints were filed simultaneously against the other two commercial television networks. *United States* v. *CBS Inc.*, No. 74-3599-RJK (C.D. Cal.); *United States* v. *American Broadcasting Cos.*, No. 74-3600-RJK (C.D. Cal.).[1]

On November 17, 1976, the United States and NBC filed a proposed final judgment. In essence, it enjoins NBC from obtaining any interest in television entertainment programming produced by others, except for the right to network exhibition (Pet. App. 23a), and

[1]Similar complaints had been filed against the three networks in April 1972. They were dismissed without prejudice in November 1974. *United States* v. *National Broadcasting Co.*, 65 F.R.D. 415 (C.D. Cal. 1974), appeal dismissed for want of jurisdiction, 421 U.S. 940 (1975). The networks alleged that the suits had been instituted for impermissible purposes. Although the government denied these allegations, the court, after the government was unable to comply with certain discovery demands, determined that dismissal without prejudice and filing new complaints during a new administration would be the most expeditious means of dispelling the allegations.

limits for ten years the amount of programming NBC may produce for use on its network (Pet. App. 24a-25a).[2] Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), the proposed judgment, a competitive impact statement, written comments by interested members of the public, and responses by the United States were appropriately filed and published. 42 Fed. Reg. 24996-25312 (1977). Petitioner filed lengthy comments criticizing the decree. Both the government and the district court considered these comments. *Id.* at 25170-25253, 25254-25266; Pet. App. 63a-67a, 82a-121a.

In response to the various comments, the United States and NBC filed a stipulation on May 12, 1977, amending the proposed judgment.[3] The stipulation also preserved litigating rights on subject matter not treated in the proposed judgment. 42 Fed. Reg. 24997 (1977).

On April 20, 1977, before the United States had filed the amended proposed final judgment or its responses to public comment, petitioner moved to intervene in the government's action against NBC. The district court denied the motion. Petitioner has appealed from this decision, and the case is under

[2]It does not limit the amount of programming NBC may produce for sale to other networks. (NBC has been a negligible factor in program production.)

[3]One significant change was the deletion of a pay cable exclusivity section, which was opposed by pay cable and other interests. Although the United States intended that section to operate as a limit on the exclusivity terms that NBC could obtain, many of those who commented felt that it would put the government's imprimatur on activity considered abusive. The comments convinced the government that the section would not provide desirable relief, and the section was deleted. 42 Fed. Reg. 25112-25114 (1977).

submission. *United States* v. *National Broadcasting Co.*, No. 77-3381 (9th Cir. argued Apr. 3, 1979).

On November 7, 1977, after its motion to intervene had been denied, petitioner moved for an evidentiary hearing on the proposed consent judgment (Pet. 8). The district court, relying on the voluminous record of comments and oral argument, entered the proposed judgment on November 23, 1977, without an evidentiary hearing (Pet. App. 37a). It filed an opinion regarding the consent judgment on January 26, 1978 (Pet. App. 41a-81a).

After the entry of judgment, but before the district court filed its opinion, petitioner sought a writ of mandamus to require that the consent judgment be vacated. The court of appeals denied the petition without opinion (Pet. App. 7a).

ARGUMENT

There is no reason for this Court to review the denial of mandamus in this case. The denial is justified by a single, compelling reason: petitioner is not a party to this case, and nonparties cannot seek appellate review by mandamus or otherwise. See *Ex parte Leaf Tobacco Board of Trade*, 222 U.S. 578 (1911). The appropriate procedure to obtain review in cases such as this is to intervene in the district court and then to appeal, as of right, from the entry of final judgment. Petitioner sought to intervene, and its motion to do so was denied. That denial is the subject of a pending appeal. If the court of appeals holds that petitioner should have been allowed to intervene, then petitioner will be entitled to appeal from the entry of the consent decree. And if the court of appeals holds that the denial of intervention was proper, then there is no reason why petitioner should be allowed to proceed by

mandamus in what amounts to an attempt to avoid the consequences of the denial of intervention.

At all events, even if a nonparty sometimes may seek mandamus,[4] a court of appeals has ample discretion to decline to issue that writ. See, *e.g.*, *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655 (1978); *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976). Because petitioner can obtain any relief to which it is entitled if it succeeds on its challenge to the denial of intervention, there was no reason for the court of appeals to resort to an extraordinary writ.

Finally, petitioner's arguments on the merits do not establish that the district court so grossly abused its discretion that the court of appeals was *required* to resort to an extraordinary remedy. The district court gave all persons a chance to present their views on the merits of the decree; petitioner did so at length. The district court was well within its discretion not to hold an evidentiary hearing; no statute requires one. The court carefully considered the merits of the proposed decree and found that, although it displeased some persons by not going far enough and others by going too far, it was designed to address the competitive disadvantage caused by NBC's "enormous market power" (Pet. App. 80a). Petitioner's complaint (Pet. 13-16) that the consent judgment is contrary to the public interest because it will diminish potential competition

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[4]Petitioner's reliance on two cases that allowed nonparties to seek mandamus (Pet. 24) is unwarranted. Those cases involved orders directed to the press and involving the rights of the press. The fact that members of the press were addressees of the orders supplied the right to seek appellate relief. Petitioner, however, is not the addressee of any order entered in this case. Nothing affects petitioner's rights.

in program supply amounts to a request that the case proceed to a trial on the merits, the very thing a consent judgment is designed to avoid. The particular provision to which petitioner objects will not take effect until similar relief is obtained in suits against CBS and ABC (Pet. App. 33a, para. VII). It thus causes no immediate harm to petitioner; if CBS prevails in its suit, the provision will never become effective. It is, moreover, similar both in effect and in duration to the relief approved by this Court in *Ford Motor Co.* v. *United States*, 405 U.S. 562, 575 n.10 (1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1685.

CBS INC.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT, NATIONAL BROADCASTING COMPANY, INC. IN OPPOSITION.

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BRIEF FOR RESPONDENT NATIONAL BROADCASTING COMPANY, INC. IN OPPOSITION.

OPINION BELOW.

The order of the Court of Appeals (App. 7a) is unreported. The opinion of the District Court which gave rise to the petition for mandamus is reported at 449 F. Supp. 127 (C. D. Cal., 1978) (App. 41a).

JURISDICTION.

The judgment of the Court of Appeals was entered on April 12, 1978 and petition for rehearing was denied on February 5, 1979. The petition for writ of certiorari was filed on May 7, 1979. Jurisdiction of this Court has been invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED.

Whether the Court of Appeals abused its discretion in denying a petition for writ of mandamus of a non-party directed at the discretionary decisions of the District Court in approving a consent judgment and in determining the procedures to be used in such approval.

STATEMENT.

National Broadcasting Company, Inc. ("NBC") files this brief in opposition to the petition for writ of certiorari filed by CBS Inc. ("CBS"), by which CBS challenges the order of the Court of Appeals for the Ninth Circuit denying CBS' petition for writ of mandamus. In its mandamus petition, CBS attacked the decision of the District Court approving a Final Judgment (App. 20a) (generally referred to herein as "the Consent Decree") terminating **United States v. National Broadcasting Company, Inc.**, Civ. No. 74-3601-RJK (C. D. Cal.).

The Consent Decree at issue settled an antitrust action commenced by the United States against NBC in December, 1974. CBS was not a party to this lawsuit; however, virtually identical actions simultaneously were filed against CBS and American Broadcasting Companies, Inc. ("ABC"), the other two major commercial television networks. **United States v. CBS Inc.**, No. 74-3599 (C. D. Cal.), **United States v. American Broadcasting Companies, Inc.**, No. 74-3600 (C. D. Cal).[1]

In the course of litigation, NBC and the Government entered into settlement negotiations. ABC and CBS did not negotiate or agree to a consent decree and the respective actions against them are proceeding to trial. NBC and the Government, however, were able to negotiate a settlement. The resulting Consent Decree was submitted to the District Court for approval on November 17, 1977.

In order to reach settlement, NBC agreed to accept various injunctive restrictions principally dealing with

1. Virtually identical predecessor suits had been dismissed without prejudice by the District Court because of plaintiff's failure to comply with discovery orders going to the question whether the suits were commenced with improper motive. **United States v. National Broadcasting Co., Inc.**, 65 F. R. D. 415 (C. D. Cal. 1974), *appeal dismissed*, 421 U. S. 940 (1975).

NBC's production and acquisition of programs. Nothing in the NBC Consent Decree places any restriction on CBS, which remains free to negotiate any term it desires with its program suppliers. CBS, of course, is also free to litigate the parallel antitrust suit brought against it by the Government, which CBS is vigorously doing.[2]

Pursuant to the Antitrust Procedures and Penalties Act ("APPA"), 15 U. S. C. § 16, the Government caused the proposed Consent Decree and a Competitive Impact Statement to be published in the Federal Register on November 24, 1976 (41 Fed. Reg. 51992 (1976)) and also caused a summary of the proposed Consent Decree and Competitive Impact Statement to be published in appropriate newspapers of general circulation during the period November 29-December 5, 1976.

Following the procedures under the APPA, 15 U. S. C. § 16(d), numerous Comments regarding the Consent Decree were received and considered. CBS itself provided the District Court with a filing of over 150 pages, including a 47 page set of Comments plus six appendices totalling an additional 107 pages. Included were extensive affidavits from a professor of economics, and a professor of law specializing in antitrust law.

CBS also moved to intervene in the District Court, relying on essentially the same arguments made in its Comments and, indeed, appending those Comments to its memorandum in support of its intervention motion. On

2. Furthermore, in negotiating the Consent Decree, the Government recognized that it would be unfair to place NBC "at a competitive disadvantage with respect to CBS or ABC. . . ." (Competitive Impact Statement, at 13). Thus, the restrictions on NBC's production and most of the restrictions on the terms that NBC could include in its contracts with program suppliers do not take effect unless and until similar restrictions are placed on ABC and CBS as a result of a consent decree or of the District Court's ruling upon completion of the respective cases against them, assuming, of course, that either of these results occurs (Section VII).

June 20, 1977, the District Court denied the CBS motion to intervene, holding that:

> —CBS lacked the requisite interest to intervene because, *inter alia*, the Consent Decree placed no restraints on CBS;
>
> —Any interest CBS might have would not be impaired, in light of CBS's ability to defend its parallel lawsuit and in light of the provision of the settlement which provided that many paragraphs of the NBC Consent Decree, including those most attacked by CBS, would not become effective unless the Government obtained similar remedies against CBS.[3]

(Memorandum of Decision and Order, June 20, 1977, at 7-8.)

After the parties had reviewed the Comments and after further discussions between them, on May 4, 1977, the Government and NBC filed a stipulation and proposed order modifying the proposed Final Judgment.[4] These modifications were explained by the Government in the *Memorandum of the United States Submitting Comments and Plaintiff's Responses Relating to the Final Judgment and Explaining Certain Changes in the Judgment*, filed May 4, 1977. This was published in the Federal Register on May 16, 1977 (42 Fed. Reg. 24995-25312 (1977)). On May 17, 1977, the Government filed a *Certificate of Compliance with the Provisions of the Antitrust Procedures and Penalties Act.*

3. See p. 3, n. 2, *supra.*

4. The May 4, 1977 stipulation deleted a provision dealing with pay cable and modified a provision dealing with pilots. In addition, the parties entered into a stipulation concerning talent and literary exclusivity arrangements, which were not and are not covered by the proposed Final Judgment, and agreed that the May 4 stipulation would not create an estoppel as to the subject matter of the deleted pay cable provision or as to talent and literary exclusivity.

On November 23, 1977, the District Court signed the proposed Consent Decree and on November 28, 1977, the Final Judgment was entered. The Court's opinion explaining its actions was filed on January 26, 1978 and entered on January 27, 1978.

In its opinion approving the Consent Decree, the District Court pointed out that the persons contesting the settlement, including CBS, had taken conflicting positions which the Court had considered "in light of the special interest of the respective proponents thereof." (App. 70a) This fragmented opposition to the settlement, the terms of which fell between the polarized positions of the commenting persons, and the fact that the Consent Decree was consistent with the relief sought in the Complaint (App. 77a), were among the factors which persuaded the District Court to approve the Consent Decree.

The District Court made clear that it had carefully considered all filings, including that of CBS. The Court concluded that, under the discretion explicitly afforded by the APPA, it could approve the Consent Decree without the need for a hearing or other optional procedures. (App. 76a)

On December 20, 1977, CBS filed a petition for a writ of mandamus in the United States Court of Appeals for the Ninth Circuit which essentially was based on the same arguments upon which CBS had relied in its motion for summary judgment in its own litigation,[5] in its Comments on the Consent Decree, and in its motion to intervene. The petition was denied on April 12, 1978, and rehearing was denied on February 5, 1979.

5. This motion was denied by the District Court on Feb. 9, 1977, *Memorandum of Decision and Order*, Feb. 16, 1977.

Argument.

I. THE COURT OF APPEALS PROPERLY DENIED THE PETITION FOR WRIT OF MANDAMUS.

The District Court's entry of a Consent Decree in this case was proper and the resulting denial of the writ of mandamus by the Court of Appeals does not warrant review. This Court has made amply clear that "the remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances." **Kerr v. United States District Court,** 426 U. S. 394, 402 (1976), and cases cited therein. No such extraordinary circumstances exist here.

The conditions which must be present before a writ of mandamus may issue were succinctly stated in **Kerr:**

> "As a means of implementing the rule that the writ will issue only in extraordinary circumstances, we have set forth various conditions for its issuance. Among these are that the party seeking issuance of the writ have [sic] *no other adequate means to attain the relief he desires,* [citations omitted], and that he satisfy 'the burden of showing that [his] *right to issuance of the writ is clear and indisputable.*' [Citations omitted.] Moreover, it is important to remember that issuance of the writ is in large part a matter of discretion with the Court to which the petition is addressed. [Citations omitted.]" *Id.* at 403 (emphasis added).

CBS fails to satisfy these requirements for two reasons. First, mandamus was not CBS's only means to contest the NBC Consent Decree. CBS has had available and has employed other means to seek the relief it desired. Indeed, CBS made virtually the same attacks on the Consent Decree that it makes here in even greater detail in its Comments and affidavits filed in the District Court.

CBS also moved to intervene in the District Court under F. R. Civ. P. 24(a) and (b). Here too, CBS made the very same attacks against the Consent Decree that it sought to make through its petition for mandamus. The District Court denied intervention and CBS appealed to the Ninth Circuit. Significantly, CBS's brief on that appeal, which is now pending, contains the same arguments made in the instant petition for certiorari.

Intervention, of course, provides a proper party with a mechanism to contest the settlement of a government antitrust case in the district court and to appeal the approval of such a settlement. The fact that CBS may not have been successful in its motion to intervene does not mean that it should be granted mandamus. Mandamus is neither an alternative remedy nor a cons lation prize for persons who have failed to demonstrate sufficient interest in a lawsuit to be allowed to intervene.[6]

---

6. CBS suggests in its petition in this Court (p. 24 and note *) that certain, but not all, parties that may not intervene nonetheless are entitled to mandamus, apparently because although their interest is insufficient to make intervention appropriate, it is not so small as to prevent mandamus. CBS not surprsingly provides precious little definition as to which persons might fall into this presumably narrow middle ground category in future applications of the rule CBS propounds.

CBS cites **United States v. Sherman,** 581 F. 2d 1358 (9th Cir. 1978), for the proposition that mandamus has been considered a proper remedy, invocable by non-parties, in other cases. **Sherman,** however, involved a District Judge's order to the press not to discuss a terminated criminal case with jurors. A newspaper both appealed the judgment of the Court in the criminal action and sought mandamus. The Court of Appeals held explicitly that appeal was not a proper procedure to be invoked by a newspaper

The second requirement imposed by this Court is that a person seeking mandamus demonstrate that his right to issuance of the writ is "clear and indisputable." Yet the CBS petition for writ of mandamus attacks the *discretionary* decisions [7] of the District Court in considering and in approving the Consent Decree; and these exercises of discretion by the District Court are exactly what the writ of mandamus is designed *not* to cover:

> "Mandamus issues to compel an officer to perform a purely ministerial duty. It cannot be used to compel or control a duty in the discharge of which by law he is given discretion." **Work v. Rives,** 267 U. S. 175, 177 (1925).

On this ground alone, mandamus is improper.

Finally, **Kerr** makes clear that review is not warranted because the decision of the Court of Appeals in denying mandamus also is discretionary, 426 U. S. at 403.

6. (Cont'd.)
under these circumstances. Consequently, it became apparent that there was no other adequate source of relief. In the present case, however, CBS bases its appeal from denial of leave to intervene on precisely the same grounds that it seeks mandamus. Furthermore, the **Sherman** case involved a major First Amendment question, with no countervailing policy considerations.

Moreover, here CBS can show no restraint on its own activity. The Consent Decree limits NBC only. CBS is free to negotiate its own terms with suppliers and to litigate its own parallel lawsuit. Additionally, in large part the NBC Consent Decree does not take effect unless CBS, after suit or by its own settlement, is likewise restricted. Thus if CBS prevails in its own lawsuit, it will have established that the provisions of the NBC Consent Decree about which it complains are not valid, and such provisions will not take effect.

7. See Sections II and III, *infra*.

II. THE DISTRICT COURT'S APPROVAL OF THE NBC CONSENT DECREE WAS A PROPER EXERCISE OF DISCRETION.

CBS' petition is particularly inappropriate, considering that decisions of the District Court approving consent decrees terminating government antitrust cases are traditionally discretionary, with virtually no role even for appellate review, let alone extraordinary review by mandamus.

This Court long has recognized that the role of the Courts in passing on settlement agreements in Government antitrust cases is extremely limited. The Court explicitly stated in **Sam Fox Publishing Co. v. United States,** 336 U. S. 683, 689 (1961):

> "[S]ound policy would strongly lead us to decline . . . to assess the wisdom of the Government's judgment in negotiating and accepting the . . . consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting." [8]

Contrary to CBS' suggestions, this long-standing rule has not been altered by passage of the APPA. The intent of Congress in passing that statute was to create the equivalent of a "sunshine law" for consent decree approval proceedings.[9] In the words of Senator John Tunney, one of the bill's sponsors, it was his expectation that "the consent decree process will be opened up to public scrutiny and judges will take a more active role in assessing the

8. No claim of bad faith or malfeasance has been made in this case.

9. The procedural aspects of the APPA, and the objections of CBS to the procedures used by the District Court here, are discussed in Section III, *infra*.

worth of the proposed judgments." These comments, made in the context of legislative discussion of the allegedly tainted IT&T settlement, clearly were directed at the "bad faith or malfeasance" exception of **Sam Fox,** not to any wholesale involvement of the Courts in the details of settlements. 120 Cong. Rec. S 20862 (daily ed. Dec. 9, 1974). There is, no indication at all in the statutory history that Congress intended to alter the judiciary's limited role in approving consent judgments.[10]

This is exactly the view taken by the courts under the APPA. In **United States v. Associated Milk Producers, Inc.,** 393 F. Supp. 29 (W. D. Mo. 1975), *aff'd,* 534 F. 2d 113 (8th Cir. 1976), *cert. denied sub nom.,* **National Farmers Organization v. United States,** 429 U. S. 940 (1976), the District Court reexamined actions taken prior to the APPA and found them consistent with the Act. In making its public interest determination, the Court held:

> "A court's powers to do very much about the terms of a particular decree, even after it has given the decree maximum, rather than minimum, judicial scrutiny, is a decidely limited power. *See* **United States v. Ward Baking Co.,** 376 U. S. 327, 84 S. Ct. 763, 11 L. Ed. 2d 743 (1964). Power to reform the procedures under which consent decrees are actually negotiated is invested in the executive and legislative branches, not the judicial. And, if Congress wants the judicial branch to have more power than that implicit in a threat of total rejection of a proposed decree, such power must be authorized by legislation which is considerably broader in scope than that vested by the newly enacted Antitrust Procedures and Penalties Act or by existing law." 394 F. Supp. at 42. *See* **United States v. Gillette Co.,** 406 F. Supp. 713, 716 (D. Mass. 1975): "The Court is not settling this case. It is determining whether the settlement is within the reaches of the public interest."

10. CBS in its present petition (p. 13) poses a hypothetical case in which a district court chooses to approve a consent decree which it expressly finds not to be in the public interest. Clearly no rule of appellate review need be developed to deal with so far-fetched a situation. Suffice it to say, for present purposes, that the District Court's extensive opinion setting out its reasons for holding approval of the NBC Consent Decree to be in the public interest is exactly the type of explanation which Congress intended as sufficient action by the district judge.

Here, after precise compliance with the APPA's required procedures, the District Court concluded that it had before it a reasonable compromise. On the one hand, program suppliers argued that the Consent Decree was not sufficiently restrictive; on the other, CBS maintained that it was *too* restrictive and that the underlying lawsuit was without merit. It can hardly be contended that, in passing the APPA, Congress intended to interfere with the District Court's long standing discretionary power to approve reasonable compromise settlements entered into by the parties after appropriate public disclosure.

It also bears emphasis that nothing in the APPA history supports a claim for appellate involvement, whether by mandamus or otherwise. The APPA itself makes absolutely no provision for appellate review by the Court of Appeals, something Congress readily could have provided had it so intended.

III. THERE IS NO VALID BASIS FOR OBJECTING TO THE PROCEDURES UTILIZED BY THE DISTRICT COURT.

CBS suggests that the District Court somehow erred because it failed to hold an evidentiary hearing. However, there is no such requirement under the APPA. The decision whether to hold a hearing, or to utilize any of the other like procedures available under the APPA, was within the discretion of the District Court.[11]

Subsection (f) of the APPA, 15 U. S. C. § 16(f) (App. 5a-6a), provides that in making its determination of whether a consent decree is in the public interest, a district court *may* utilize various procedures, including the holding of a hearing and the taking of evidence. Congress clearly did not intend that a district court be required to utilize these procedures when the court did not deem it necessary to do so. In fact, Congress intended exactly the opposite. The Senate Judiciary Committee made clear that:

> "It is not the intent of the Committee to compel a hearing or trial on the public interest issue. *It is anticipated that the trial judge will adduce the necessary information through the least complicated and least time-consuming means possible.* Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, this is the approach that should be utilized. Only where it is imperative that the court should resort to calling witnesses for the purpose of eliciting additional facts should it do so.

11. There is no question that the APPA's mandatory procedures, such as notice and publication of the Consent Decree, were satisfied.

> Nor is § 2(e) intended to force the government to go to trial for the benefit of potential private plaintiffs . . . ." Senate Report, 93-298, at 6 (Emphasis supplied).

In a similar vein, Rep. Barbara Jordan said:

> "It is not the intention of the committee to require the courts to conduct a hearing or trial on the public interest question. *It is anticipated the trial judge will adduce the necessary information through the least complicated and least time-consuming means possible.*" 120 Cong. Rec. 36344 (1974). (Emphasis supplied.)

And the bill's manager, Rep. John Seiberling, explicitly stated that a district court has no obligation to utilize any of the procedures provided by the Act:

> ". . . the bill expressly provides that while the court *does not have any mandatory requirement* to make further inquiries, it has the specific authority to do so, an authority which it now has under its general equity powers but which is spelled out in the proposed legislation along with some explicit statutory guidelines." 120 Cong. Rec. 36342 (1974). (Emphasis supplied.)

Under these circumstances, appellate review of the particular procedures which a district judge feels should be utilized in a given consent decree approval proceeding of necessity must be extremely limited. Where, as here, a district court has had the opportunity to review extensive comments and affidavits, it is peculiarly within the court's discretion whether an evidentiary hearing, the appointment of a special master, consultation with experts,

or any of the other procedures permitted under the Act are of any utility in the matter before it. *See* **United States v. American Milk Producers, Inc.**, *supra;* **United States v. Gillette Co.**, *supra.* Hence no procedural issue arises meriting review.

CONCLUSION.

For the foregoing reasons, CBS' petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1685

CBS INC.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (KELLEHER, D.J.), UNITED STATES OF AMERICA and NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The most noteworthy aspect of the opposing briefs of the United States and NBC* is that neither anywhere addresses the central thrust of the CBS petition—that the District Court approved a decree which was manifestly *anticompetitive* and, hence, incompatible with the requirement of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), that the decree be found to be "in the public interest". This gaping omission dramatizes the importance of the questions concerning the proper interpretation and application of the APPA presented by the petition.

Instead of addressing those questions, respondents resort to unsound technical arguments regarding the right of nonparties to seek review, and to a cramped reading of the APPA which is belied by its language and legislative history. For these and other reasons elaborated below, the arguments in opposition are unpersuasive.

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* Those briefs are referred to herein as "U.S. Br." and "NBC Br.", respectively.

1. Respondents' Claim That There Was No Abuse of Discretion Because the Anticompetitive Nature of the Decree Is Irrelevant Under the APPA.

CBS's petition demonstrated, citing the unrebutted affidavits from several distinguished economists and commentators presented to the District Court, that the proposed decree was contrary to the public interest because, *inter alia*, it would operate to drive up prices paid to producers of television programming by restraining competition among them, in square conflict with the procompetitive policies declared by the Sherman Act. (Petition, pp. 13-16)

The only response of the Department of Justice is that "[p]etitioner's complaint . . . that the consent judgment is contrary to the public interest because it will diminish potential competition in program supply amounts to a request that the case proceed to a trial on the merits, the very thing a consent judgment is designed to avoid." (U.S. Br., pp. 5-6)

In other words, according to the Department:

> (1) the Department does not deny that the decree may in fact be anticompetitive;
>
> (2) however, it was not practical for the District Court, short of a full trial on the merits, to determine whether the decree is anticompetitive; and
>
> (3) therefore, the District Court could properly find the proposed decree to be in the public interest even if it is anticompetitive.

Surely this is an extraordinarily perverse position for the government agency entrusted with the vigorous enforcement of the procompetitive policies of the antitrust laws to be taking. The Department's conclusion disregards the APPA's clear requirement of an informed judicial determination that the decree is in the public interest, rather than a passive

acceptance of the Department's preconceived views as to appropriate relief. Moreover, the minor premise of the Department's specious syllogism is erroneous because the required determination can be made without proceeding to a full trial on the merits. Sensible utilization of the panoply of procedures specifically made available to the District Court under the APPA (15 U.S.C. § 16(f)), including the conduct of an evidentiary hearing, permit a sharply focused inquiry into the consequences of the proposed decree. The issue to be addressed in that inquiry—whether the decree is anti-competitive *vel non*—is different from and much narrower than the issues framed by the pleadings—whether NBC violated § 1 and § 2 of the Sherman Act.

Furthermore, the Department's argument of inconvenience ignores petitioner's contention that the decree is anticompetitive on its face (and as explicated by the Department's Competitive Impact Statement). If that contention is sound, then no further proceedings were required; the decree simply had to be rejected as a matter of law. In all events, since the only evidentiary material before the District Court was the decree itself and the affidavits submitted by petitioner clearly showing that the decree was anticompetitive, further proceedings were required only if the Department wished to try to rebut petitioner's claim. Absent some countervailing evidence, the court was required to reject the decree since the preponderance, indeed all, of the evidence in the record before it tended to establish its anticompetitive character.

True it is that consent decrees are meant to avoid full trial on the merits of alleged violations of the antitrust laws. But it is not true, at least since the enactment of the APPA, that a consent decree can pass muster in the face of unrebutted sworn testimony as to its anticompetitive nature without further rigorous examination by the dis-

trict court.* Even though the District Court here had earlier conceded that CBS's contention required a "major inquiry", the court avoided any such examination.

NBC's response does not make any effort to rebut CBS's contentions that the decree is anticompetitive. Instead, NBC argues, without elaboration, that the decree was a "reasonable compromise" in light of the arguments of program suppliers that the decree was "not sufficiently

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* The need for such examination has been recognized by the Department in less partisan circumstances. The Assistant Attorney General in charge of the Antitrust Division testified at the Senate hearings on the bill:

> "in some instances [the APPA] could *require* a full hearing prior to approval of consent decrees, involving the subpena [sic] of documents and witnesses, and the taking of sworn testimony concerning . . . *the anticipated effects of the proposed judgment* . . . .
>
> ". . . .
>
> "Disagreement over remedy frequently reflects disagreement over facts. *Disagreement over facts requires judicial resolution, and that in turn requires a full evidentiary hearing.*
>
> ". . . .
>
> "Any discussion of the long-term effects of a judgment also involves a great deal of 'crystal ball gazing.' If done in the abstract, the discussion is likely to be useless. To avoid abstraction, *detailed facts must be presented to the court.*" The Antitrust Procedures and Penalties Act: Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 93d Cong., 1st Sess. 89, 93 (1973) (Statement of Hon. Thomas E. Kauper, Assistant Attorney General, Antitrust Division, United States Department of Justice) (emphasis supplied).

The Deputy Assistant Attorney General made similar remarks in the House hearings on its version of the APPA. Bruce B. Wilson testified that under the statute:

> "the Court would consider itself obligated to evaluate and could take testimony concerning, the anticipated effects of the relief contained in the proposed judgment. This inquiry would encompass not only whether the relief is adequate in view of that sought in the complaint, but whether the Government sought appropriate relief in the complaint itself."

Consent Decree Bills: Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, 93d Cong., 1st Sess. 61, 62, 86-87 (1973). (Statement of Hon. Bruce B. Wilson, Deputy Assistant Attorney General, Antitrust Division, United States Department of Justice).

restrictive" and those of CBS that it was "too restrictive." (NBC Br., p. 11) NBC, of course, misconstrues CBS's position. CBS argued, not that the decree was "too restrictive", but that it was fundamentally misconceived in that it would restrain competition and drive up prices, a result totally antithetical to the purpose of the laws the decree would ostensibly enforce. But, no matter how "reasonable", the decree cannot be found in the public interest notwithstanding its anticompetitive nature simply because it was the result of "compromise".

In like vein, NBC seeks to justify the District Court's approval of the decree by citing judicial observations that " 'a court's powers to do very much about the terms of a particular decree' " are limited. (NBC Br., p. 10 *quoting United States* v. *Associated Milk Producers, Inc.*, 394 F. Supp. 29 (W.D. Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied sub nom. National Farmers Organization* v. *United States*, 429 U.S. 940 (1976)). But, of course, CBS did not request that the Court *change* the terms of the decree; it requested that the Court *reject* them outright as anticompetitive.

Accordingly, it is most inappropriate for respondents to take refuge, as they do, in the half-hearted argument that mandamus does not lie against a district judge in the absence of a "gross abuse of discretion." (*e.g.*, U.S. Br., p. 5) For a district court to saddle a major industry with a scheme of regulation subversive of the purposes of the Act it intended to enforce is surely a gross abuse. To do so without making the slightest effort to obtain evidence that could support the conclusion that the decree is in the public interest is grosser still. In all events, it is well settled that mandamus is available to correct clear abuse of discretion by a district court. *See, e.g., Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 (1964); *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 257 (1957); *Goldblum* v. *National Broadcasting*

Co., 584 F.2d 904, 906 n.2 (9th Cir. 1978). And entry of this decree as consistent with the public interest in the teeth of unrebutted and sworn proof of its anti-competitive character—not denied by either respondent— was just such a clear abuse of discretion.*

2. Respondents' Argument That Mandamus Is Not Available Because CBS's Exclusive Remedy Was by Way of Intervention.

Citing well-known precedent that mandamus will not issue when another adequate remedy is available, both respondents argue that CBS can obtain whatever relief it is entitled to by way of intervention. (U.S. Br., p. 5; NBC Br., pp. 6-8) As noted in the petition for certiorari (p. 7) CBS timely moved to intervene in the District Court proceedings following filing of the proposed decree and Competitive Impact Statement, but the District Court denied that motion. On June 4, 1979 (after the instant petition had been filed with this Court), the Court of Appeals for the Ninth Circuit affirmed that denial.** The Court of Appeals reasoned that intervention as of right was inappropriate because CBS's interest had been adequately represented by the Department of Justice. It is not apparent how the Court of Appeals could rationally conclude that CBS was adequately represented by the Department inasmuch as (1) CBS sought the status of intervenor precisely to establish that the Department was proceeding in dereliction of its mandate under the Sherman Act and

* It is clear as well that an abuse of discretion by the Court of Appeals in declining (without explanation) to entertain the petition for mandamus can be corrected by certiorari in this Court. *See, e.g., United States* v. *Nobles*, 422 U.S. 225, 241-42 n. 16 (1975); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 396-97 (1959).

** The Ninth Circuit's memorandum decision affirming the denial of CBS's motion to intervene is unreported. It is set forth at pp. A-18 to A-25 in the blue covered Appendix ("Appendix II") to CBS's separate petition for certiorari ("Petition II") filed this day seeking review of that decision. That Appendix is cited herein as "App. II ".

(2) the Department is CBS's adversary in a companion case* [*United States* v. *CBS Inc.*, Civil No. 74-3599-RJK (C.D. Cal.)]. CBS is today filing with this Court a petition for certiorari seeking review of that decision of the Court of Appeals.**

It is sufficient to note here that, in the present posture of the case, a determination by this Court that intervention should have been granted, particularly if coupled with guidance to the District Court as to the substantive and procedural standards to be applied in complying with the APPA, would furnish adequate relief. However, a determination that denial of intervention was proper should not affect consideration of the merits of the instant petition. As pointed out in the petition for certiorari (p. 24), the CBS petition for mandamus rests on considerations altogether different than those involved in the intervention appeal. Irrespective of the scope and nature of the right to intervene, the APPA expressly recognizes that non-intervening "interested persons" have a significant public interest role to play in proceedings at the district court level.

* This adversary relationship clearly rebuts any presumption that in government antitrust cases the Department adequately represents the interests of absent persons. For it is hornbook law that representation by an adverse party cannot be considered adequate. *See, e.g., Stadin* v. *Union Elec. Co.*, 309 F.2d 912, 919 (8th Cir. 1962) (Blackmun, J.), *cert. denied*, 373 U.S. 915 (1963); *Brennan* v. *UAW Community Action Program*, 19 Fed. R. Serv. 2d 117, 122 (D. Conn. 1973); 7A C. Wright & A. Miller, *Federal Practice & Procedure* § 1909, at 523-24 (1972). Not only is such representation inadequate, it is unethical. *See Joseph Skillken & Co.* v. *City of Toledo*, 528 F.2d 867, 876 (6th Cir. 1975), *vacated on other grounds and remanded*, 429 U.S. 1068 (1977).

** Because of the importance of the underlying issues as to the proper interpretation and enforcement of the APPA, we urge this Court to review both petitions together to facilitate consideration of all appellate remedies available to assure compliance with the APPA.

Furthermore, to focus on the status of the case at the early stage when intervention was sought may improperly restrict the inquiry as to all relevant circumstances bearing upon the propriety of entry of the decree. The District Court's denial of intervention was coupled with an undertaking thereafter to conduct a "major inquiry" as to whether the decree would have an anticompetitive effect in the television industry. (Petition, p. 8) The District Court's failure—*subsequent* to the denial of intervention—to conduct any such inquiry whatsoever and its approval of the decree merely because it was consistent with the purpose of the Department of Justice in filing the complaint were not in issue on the appeal from the denial of intervention, but were raised by the petition for mandamus and this petition for certiorari.

3. Respondents' Argument That CBS as a Nonparty Has No Appellate Rights.

CBS's petition showed (p. 24) that mandamus is available to aggrieved nonparties, citing *United States* v. *Sherman*, 581 F.2d 1358 (9th Cir. 1978), and *CBS Inc.* v. *Young*, 522 F.2d 234 (6th Cir. 1975), two cases wherein such relief was afforded.

The Department is wrong in contending that "nonparties cannot seek appellate review by mandamus" and in its attempts to distinguish the *Sherman and Young* cases. (U.S. Br., pp. 4-5) Contrary to the Department's assertion, mandamus was not granted in those two cases because petitioners therein were "addressees" of the orders involved. Both cases found standing to obtain mandamus solely because the petitioners met the two requirements for standing enunciated by this Court in *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970); each alleged that the challenged action had caused it "injury in

fact", 397 U.S. at 152, and each was "arguably within the zone of interests to be protected or regulated by the statute . . . in question", 397 U.S. at 153. *See United States* v. *Sherman, supra*, 581 F.2d at 1360-61; *CBS Inc.* v. *Young, supra*, 522 F.2d at 237-38.*

CBS meets both requirements here. The restraint of competition among program suppliers procured by the consent decree injures CBS's interests as a major buyer of programs. *See Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 135-36 (1967). And protection of its interests in buying in a competitive market is clearly "arguably within the zone of interests . . . protected or regulated" by the APPA and by the Sherman Act itself.

NBC's attempted distinctions are similarly without merit. Its contention that mandamus in *Sherman* rested on First Amendment considerations has no support in the cases** and ignores the fact that CBS has explicitly urged

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* Moreover, the Department is incorrect when it characterizes the petitioners in *Sherman* and *Young* as "addressees". The order at issue in *Young* was addressed neither to CBS Inc. by name nor to the press in general, but to counsel, court personnel, the parties and their relatives, friends and associates. 522 F.2d at 236, 238, 239. And, as the court noted in *Sherman*, the "trial judge's statement that his order applied to 'everyone' including the news media is insufficient to make the Seattle Times [petitioner therein] a party". 581 F.2d at 1360. Noteworthy in this regard is another case wherein nonparties who were not "addressees" successfully obtained mandamus, *Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi* v. *Martin*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) (action for injunctive and declaratory relief against judge's order in another action treated as petition for mandamus to correct that order).

** NBC focuses exclusively on *Sherman*, noting that *Sherman* held explicitly that appeal was not therein available, and that that case "involved a major First Amendment question, with no countervailing policy considerations". (NBC Br., pp. 7-8 n.6) NBC does not mention the *Young* case, which, of course, did not contain any dis-

that the decree imposes a prior restraint on speech impermissible under the First Amendment. (Petition, p. 9; App. 67a) Further, its contention that there is nothing in the history of the APPA to support a claim for appellate involvement either by mandamus or otherwise (NBC Br., p. 11) is readily refuted. Senator Tunney, co-sponsor of the APPA in the Senate explained the design of the bill in terms that demonstrate that review is called for here because of the District Court's failure to follow the requirements of the APPA:

> "The decision to make those procedures discretionary is dictated by a desire to avoid needlessly complicating the consent decree process. There are some cases in which none of these procedures may be needed. *On the other hand, there have been and will continue to be cases where the use of many or even all of them may be necessary. In fact, in a very few complex cases, failure to use some of the procedures might give rise to an indication that the district court had failed to exercise its discretion properly.*
>
> "Second, the procedures are not meant to be exclusive. Rather, they are designed as guides for the courts to follow. To a considerable extent, they serve as safe harbors for a court to look to when faced

cussion of the availability of appeal or intervention but did consider the countervailing policy, the right to a fair trial, at issue therein.

Although the above cases involved the assertion of First Amendment rights by the petitioners, none of them even remotely suggests that standing for mandamus differs in the First Amendment context. Indeed, none of the cases cites any First Amendment authority whatsoever in finding that the petitioners therein had standing to seek mandamus. Moreover, at least one court of appeals has implied that mandamus is available to a nonparty in a non-First Amendment context if the purpose for which mandamus is sought is sufficiently important. *See Martindell* v. *International Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2d Cir. 1979).

> with a difficult case. *By following one or more of the procedures contained in this provision* [15 U.S.C. § 16(f)], *an individual judge can develop the data he needs without fear that he is embarking upon an untried and perhaps reversible journey.*" 119 Cong. Rec. 3453 (1973) (remarks of Sen. Tunney) (emphasis supplied).

4. Respondents' Contention That the Decree Causes "No Immediate Harm" to CBS.

Finally, respondents argue that CBS should not be concerned by entry of the decree because those portions as to which it objects will not come into effect unless similar relief is obtained against CBS in the pending action brought against it. (U.S. Br., p. 6; NBC Br., p. 8)

This reliance on the conditional deferral of certain provisions of the *NBC* decree is misplaced. In the first place, under Section VII of the proposed decree, some of the provisions of the decree go into effect promptly after its entry (Sections IV(A) and (B); VI(A), (B), (D), (E)(ii) and (iii)). Moreover, to the extent NBC begins to conform its practices to the decree in anticipation of the other provisions (Sections V; VI(C), (E)(i), (F), (G) and (H)) coming into effect, the decree will tend to establish a standard, industry-wide pattern of practice. The promulgation and judicial approval of the decree is likely to have an immediate impact even though enforcement of some provisions is deferred. *Cf. Plymouth Dealers' Ass'n* v. *United States*, 279 F.2d 128 (9th Cir. 1960) (publication of suggested retail prices illegal even though only suggestions of the point at which bargaining was to begin).

Furthermore, under the APPA the District Court had to determine whether the decree in its entirety was "in the public interest" as a condition precedent to its entry. In-

deed, the District Court has now held that the decree satisfies the public interest standard without qualification or caveat. It would obviously have been wholly inappropriate for the District Court to have made that determination if, for whatever reasons, it was not satisfied on the question and was relying, sub silentio, on the possibility that further proceedings in *United States* v. *CBS* or *United States* v. *ABC* would resolve the doubt or preclude the operations of some provisions of the *NBC* decree. It cannot be assumed that the District Court engaged in a purely hypothetical exercise when it held that entry of the *NBC* decree was "in the public interest". Proceedings with respect to the decree in this action are the proper occasion to determine whether this decree does violence to the public policy declared by the Sherman Act as CBS claims. Where, as here, anticompetitive effects of grave significance to CBS are demonstrated, that determination cannot be deferred to another proceeding at another time. *See Denver & R.G.W.R. Co.* v. *United States,* 387 U.S. 485, 501-07 (1967).

The District Court's further explanation that "disposition of the proposed decree will not have a *stare decisis* effect on the CBS litigation" (Memorandum of Decision and Order dated June 20, 1977, denying CBS's motion to intervene, App. II A-16) only confuses matters still more. The District Court based this curious conclusion on the fact that "the NBC case now involves a consent decree, which by its express terms does not bind the parties to any adjudication or admission of fact or law".* (App. II A-16). The court was apparently confusing the doctrines

* The decree recites that the United States and NBC have:
". . . consented to the entry of this Final Judgment, without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or admission by any party with respect to any issue of fact or law in any action or proceeding . . ." (App. 20a).

of stare decisis and res judicata.* Whatever the effect of the decree as between the United States and NBC and whatever its evidentiary significance as against NBC in future proceedings, the District Court's determination that a decree of this character is in the "public interest" is a not unimportant precedent. To the extent that other district courts are disposed to adhere to the doctrine of stare decisis, the public interest determination here will stand as precedent, however ill-advised.

Moreover, it would be ignoring the obvious not to recognize that substantially similar decrees are sought by the plaintiff in its actions against CBS and ABC, which are pending before the same district court judge, on complaints virtually identical to that in *United States* v. *NBC*. Obviously the public interest determination here has major significance for critical issues in those actions. It is simply not credible that the District Court will not regard its own public interest determination in this action as a weighty consideration in the two other network actions. When CBS seeks to show in *United States* v. *CBS* that network program production is procompetitive, only amnesia would lead the District Court to disregard that which it had done before.** The establishment of such precedent in these circumstances is an immediate injury.

* The determination that this decree is "in the public interest" may have stare decisis effects regardless of whether the parties are "bound":

> "[T]he doctrine of stare decisis does not depend at all on res judicata; it accepts a former decision as controlling because the conclusions reached and the reasoning used therein are applicable to the case at bar". IB J. Moore, *Federal Practice* ¶ 0.402, at 56 (1974) (footnotes omitted).

** *See Transcontinental Gas Pipe Line Corp.* v. *Federal Energy Regulatory Comm'n,* 589 F.2d 186, 187-90 (5th Cir. 1979) (condition included in pipe line certificate of public convenience and necessity, which would not come into effect until later issuance of rate order, was ripe for review where appellant argued that agency would likely adhere to earlier ruling and include condition in rate order).

CONCLUSION

The petition and the two briefs in opposition set forth perceptions of the proper purpose and scope of the APPA that are poles apart. In petitioner's view, the statute requires an adjudication as to whether a decree is in the public interest based on a meaningful inquiry into the bases for the assurances of the settling parties that a proposed decree is consistent with the public interest, particularly where a substantial and unrebutted showing has been made of its essentially anticompetitive character. The commitment of such adjudicatory power to the district courts presupposes some appellate review and correction of clear error. Respondents, on the other hand, urge the Court to construe away the plain language of the statute, disregard the procompetitive purposes which it was intended to promote, and recreate insofar as possible the permissive standards of pre-APPA days when a district court could comfortably affix its unreviewable imprimatur on a decree upon the mere say-so of the Department of Justice that the decree was consistent with whatever the Department's objectives might be.

This petition, and CBS's petition seeking review of the Court of Appeals' affirmance of the District Court's denial of intervention, present this Court with an unusual opportunity carefully to consider the nature of the appellate remedies available to ensure the proper enforcement of the APPA, a major but as yet little-construed statute of enormous importance in promoting a procompetitive economy. Accordingly, we respectfully urge that this Court

consider this petition and CBS's petition on the intervention issue together, and that both petitions be granted.

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Respectfully submitted,

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